IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (A. 205-213) is reported at 397 F.2d 157. The finding of fact, conclusions of law and orders of the National Labor Relations Board (A. 166-204) are reported at 164 NLRB No. 49.

JURISDICTION

The decree of the Court of Appeals was entered on July 3, 1968 (A. 213). The petition for certiorari was filed on September 28, 1968, and was granted on December 16, 1968 (A. 214; ___ U.S. ___, 21 L.Ed.2d 462). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 10(e) of the National Labor Relations Act as amended, 29 U.S.C. § 160(e).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provisions

The First Amendment to the Constitution provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech . . . "

Statutory Provisions

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 544; 73 Stat. 544; 29 U.S.C. § 141, *et seq.*) are as follows

Section 8(c):

> "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 9(c):

> "(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
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> "(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
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> "(B) by an employer, alleging that one or more individuals or labor organizations have presented

to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 10(e):

" . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

QUESTIONS PRESENTED

(1) Whether the National Labor Relations Board has authority, under the provisions of the National Labor Relations Act, to order petitioner to bargain with a labor organization that has lost a Board-conducted secret ballot election.

(2) In the alternative, if the Board has such authority under the Act, whether petitioner was lawfully entitled to refuse to recognize the Union and to insist upon an election upon the ground that authorization cards are unreliable, and without a requirement that petitioner conduct an investigation into the authenticity of such cards *or* be rele-

gated to a mere check of the names appearing on the cards against the names on its payroll.

(3) Whether a combination of lawful statements made by petitioner to its employees can amount to unlawful threats and coercion as a "totality", and thereby lose their protection under the First Amendment to the Constitution and under Section 8(c) of the Act, and whether such findings by the Board can be sustained by reference to Board "expertise" and the test of substantial evidence under Section 10(e) of the Act.

STATEMENT OF THE CASE

A. Relevant Background Facts

(1) *Brief Background*

The Petitioner, The Sinclair Company, was founded in 1925 by the father of David H. Sinclair, its President (A. 92).[1] The building was acquired in 1933, together with the weaving business, when Buchanan & Holt went bankrupt (A. 94). At that time Buchanan & Holt had a collective bargaining unit of journeymen and apprentice wire weavers represented by the American Wire Weavers Protective Association or AWWPA (A. 36, 75, 92, 93). AWWPA remained the bargaining representative of the journeymen and apprentice wire weavers until 1952 (A. 82).

In about June of 1952, the AWWPA closed Petitioner's plant by a strike which continued for twelve (12) or thirteen (13) weeks (A. 93, 170). The strike was called because of unreasonable and excessive Union demands, which the Company could not meet (A. 75, 76). In order to prevent the business from failing, the plant was reopened in September, 1952, on the basis of the Company's last offer to AWWPA, and the strike was subsequently terminated (A.

[1] References to the Appendix will be designated as A. . References to portions of the Record which have not been printed in the appendix will be designated as R. . All emphasis shown is supplied unless otherwise indicated.

35, 93, 76).[2] Some, but not all, of the wire weavers returned to work without a Union contract (A. 82, 83).[3] AWWPA did not thereafter represent any of the Company's employees, and the Company had no further dealings with it (A. 82, 93).

AWWPA had always engaged in industry-wide negotiations with all twelve (12) of the companies in the industry which were held at Cleveland or at New York City (A. 92, 93). David Sinclair had been Petitioner's representative in the negotiations from 1947 until prior to 1952, when he was called into the service (A. 75, 76, 92, 93). No consideration was given to Petitioner's special problems in these industry-wide negotiations (A. 75, 76, 92, 93).

During the period from the termination of the strike in 1952 until July, 1965, when the Teamsters began its organizing efforts, no Union represented Petitioner's employees (A. 170).[4] During the period from 1952 to 1965, AWWPA merged or affiliated with the Teamsters Union (A. 36, 75, 82, 206).

(c) *Petitioner's Equipment Was Automated Between 1952 and 1965, Reducing the Skills Utilized by Weavers.*

During this same period, changes were made in weaving industry equipment. The Company's looms were automated to the point where they could be run without an operator (A. 84, 93, 94). Electric clutches and "fingers"

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[2] At that time, David H. Sinclair was in military service. He returned to the Company in January, 1954 (A. 94).

[3] The record shows that only seven (7) of the card signers were employed in 1952: St. Germain (A. 16); Neill (A. 17); Geissler (A. 29); Sikorski (A. 20); Cleland (A. 23); Dean (A. 24); Brunault (A. 27). It is undisputed, however, that a majority of the weavers had been members of AWWPA in 1952 (A. 75, 76).

[4] The only Union that had ever represented employees of Petitioner was the AWWPA. No union ever represented any other employees (A. 106).

were added, which made it much easier to operate, and some skills formerly needed were eliminated (A. 93, 94, 104, 105, R. 250). Although it was not unusual to have apprentices in 1952, the situation changed in the industry after that time because of automation (A. 82, 93, 94). The Company had had no apprentices since 1952 (A. 32, 33 81, 82).

(3) *President Sinclair Was Forced To Sell the Company in 1964.*

During the relevant period, Petitioner's parent Company was the Lindsay Wire Weaving Company of Cleveland, Ohio (A. 171). In 1952 Lindsay was one of the Company's eleven (11) competitors (A. 94). In 1963, Sinclair opened a weaving plant in Florence, Mississippi, known as the Sinclair Wire Works (A. 45). The fortunes of the Company had been at a low ebb ever since the 1952 strike, when it almost went bankrupt. The opening of the Mississippi plant failed to prevent the deterioration of the Company's position in the industry (A. 94).

In 1964, Petitioner reached the point where President David H. Sinclair was forced to sell the business that had been started by his father, and which had been owned by his family for nearly forty (40) years (A. 92, 94). It had become necessary to either sell the business or to join with another Company, if the business was to be successful in the future (A. 94).

Thereafter, Lindsay acquired 100% of the stock in The Sinclair Company, which became a Division of Lindsay (A. 45). The Florence, Mississippi, plant became a part of the Lindsay operation (A. 171). Lindsay, therefore, had one (1) plant in Florence, Mississippi; one (1) in Cleveland, Ohio; and one (1) in Mentor, Ohio (A. 171). David H. Sinclair continued as President of the Sinclair subsidiary (A. 171). At the time of its acquisition of the stock of Sin-Clair, Lindsay officers made it clear to David Sinclair that

they were looking for a profit and not for a "hole to pour money down" (A. 69).[5]

B. The Union's Organizing Drive and Its Several and Different Recognition Demands and Unit Positions.

(1) *The Commencement of the Union's Organizing Campaign.*

On or about July 3, 1965,[6] the International Brotherhood of Teamsters commenced a campaign to organize Petitioner's production and maintenance employees. A letter dated July 3, signed by Robert Williams, "President, Wire Weavers Trade Division, International Brotherhood of Teamsters," was sent to all or substantially all of Respondent's Appleton Street employees (G.C. Ex. 3; A. 6, 108; A. 31, 73).[7]

No reference to the Charging Party, Local 404, was made in the letter (G.C. Ex. 3; A. 6, 108). The writer inaccurately stated that "*We* have a collective bargaining agreement" with the parent company, "*Lindsay Wire Works* of *Lindsay*, Ohio" "which owns your employer". He mentioned other companies with which "the *Teamster Union* has contracts" and referred to negotiations "presently in process . . . at the Appleton Wire Works". He boasted:

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[5]Subsequent to the Board's order herein, The Lindsay Wire Weaving Company sold the shares of Petitioner, and since that time has not had any interest in Petitioner.

[6]All dates hereafter mentioned will refer to the year 1965, unless otherwise noted.

[7]Petitioner has two (2) plant buildings at Holyoke, one at 60 Appleton Street, which houses Petitioner's Wire Division, and the other at 115 Park Street, where its Foundry Division is located (A. 95; Resp. Ex. 2; A. 86, 147; G.C. Ex. 6; A. 8, 110). No attempt was made to organize foundry employees until after the filing, in October, 1965, of the representation petition in Case No. 1-RC-8664 (G.C. Ex. 6; A. 8, 110). Employees who were not weavers received the letter (G.C. Ex. 3; A. 6, 108) and offered copies to President Sinclair (A. 73).

> "In this last round of collective bargaining which was the first experience in the *Teamster Union*, we succeeded in getting a collective bargaining package which was better than 62½¢ over the three year period." (A. 108).

The writer then detailed some of the benefits allegedly obtained, such as:

1. Pensions of $150 per month above Social Security;
2. Hospitalization and medical services plan;
3. Life insurance of at least $3,000.00;
4. Improvements in holidays;
5. Improvements in vacations;
6. Improvements in other benefits. (A. 108)

The writer stated that he was very gratified with the results, "speaking as President of the Wire Weavers *Teamsters Union*" (G.C. Ex. 3; A. 6, 108).[8]

An "Authorization For Representation" card was enclosed with the letter (G.C. Ex. 4; A. 6, 109). In small print, almost lost in the verbiage, was the signation, "Teamsters Local Union No. 404" (A. 109).

(a) *President Sinclair Was Informed of the Teamsters Organizing Attempt*

An employee told President Sinclair about the Union's letter and authorization card and handed them to him (A. 29, 30). About ten (10) to twelve (12) other employees, some of whom were not weavers, offered copies to President Sinclair, but he informed them that he already had a copy (A. 31, 73).

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[8]The letter also states: "It is our primary hope that we can carry the benefits of our organization to all unorganized members of our trade . . ." (A. 108). It was obvious to President Sinclair that the Company would not be able to meet the unreasonable demands upon it that would result from such previous settlements (A. 51, 52).

Within a day or two after July 3, President Sinclair gave talks to all of the employees in the plant concerning the Union's organizational drive (A. 31, 34, 42). He talked to employees of the machine shop, the roll department, the cylinder department (A. 172; R. 250, 251) and to the employees of the weaving department (A. 34, 42, 172). The weaving department consisted of weavers, helpers, mechanics, finishers and seamers, but no apprentices, inasmuch as Petitioner had not had apprentices for many years (A. 74, 81). There were fourteen (14) journeymen weavers during the period from July 6 through December 9 (A. 7, 33). However, in July there were twelve (12) additional employees in the weaving department (a total of 26) who were employed as helpers, mechanics, finishers and seamers (A. 74).

Inasmuch as the Williams' letter (G.C. Ex. 3; A. 6, 108) referred to wire weaving "industry," the wire weaving "trade" and the "Wire Weavers Teamster's Union", President Sinclair assumed that organizational efforts had commenced in the Weaving Department (A. 34, 90). He told the weaving employees that he would be blunt for that reason (A. 34, 90). He talked to them for about ten (10) to twelve (12) minutes (A. 34, 172). He had no written speech or notes (A. 47, 172).

(b) *President Sinclair Talked to the Weavers in July, Long Before There Was Any Demand for Recognition.*

Mr. Sinclair siad that he was disappointed that employees, who had had a prior bad experience under a former Union, should at this time be considering the possibility of getting into a Union situation again (A. 35, 90). Mr. Sinclair reviewed the Company's considerable financial problems covering many years (A. 43, 90).[9] He said that the

[9]The financial problems had become so serious that President Sinclair had been forced to sell the family-founded and owned business and had been ordered by the new owners to produce a profit (A. 69).

long strike in 1952 had almost put the Company out of business (A. 35). President Sinclair referred to the Lindsay organization and the fact that the Company was now a part of that organization (A. 34, 90).

President Sinclair stated that he did not feel that Lindsay needed the production equipment in the Company's weaving department to meet the total needs of the entire organization, so far as production of wire cloth was concerned. He said that he did not think that the threat of a strike, if it occurred at the Company's plant, was going to worry Lindsay as far as the entire organization was concerned (A. 48, 49, 90). He said there was nothing to prevent Lindsay from having the work done in Ohio or Mississippi (A. 46, 49).[10]

President Sinclair stated, however, that it did concern *him* (A. 90). He said that he had spent his entire working life with the Company and that he continued to have high hopes for it as he had in the past (A. 90, 91).[11] He referred to the opportunity that the Company had to obtain capital funds if it could provide Lindsay with evidence that the Company could make money (A. 90). He said that such funds would be used to renew the Company's equipment, which, although it was functional and made a good product, was not the most efficient equipment available (A. 91). He stated that the Company was being by-passed in the industry and that he hoped to do something about it, which would benefit the entire Company. Mr. Sinclair said that he felt in his own mind that he would be able to do nothing about the equipment problem if the Company couldn't make money (A. 91).

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[10] As shown above, the Lindsay organization had plants in Cleveland and Mentor, Ohio, and at Florence, Mississippi.

[11] David Sinclair had worked part-time for the Company prior to 1947 and worked full-time for the Company thereafter, except for his period of service (A. 92, 93). He had been a resident of Holyoke all of his life except while away at school or in the service (A. 78). Lindsay has no such ties to Massachusetts (A. 145).

Mr. Sinclair reviewed with the employees that negotiations were a two-way street. He stated that the Company could not be forced to accept a Union proposal any more than the Union could be forced to accept anything that he proposed (A. 91). He stated that there was a situation relating to pay in the plant which was not correct, as far as he was concerned, and that he would make this a matter of negotiations, if he entered into them (A. 35, 91, 173).[12] Mr. Sinclair discussed the method under which employees were being paid on a piece work basis and pointed out that employees with equivalent skills earned different amounts of money (A. 35, 91). He stated that in many cases the Company's employees earned more money than wire weavers at Lindsay Plants (A. 91). He said that he would prefer to see a level of pay for equivalent skills and that this would mean negotiating down in some instances and up in others (A. 35, 91, 92).

President Sinclair stated that he did not have a great deal of respect for the Teamsters; that he had read a great deal about their leadership; and that this was not the kind of organization that he would like to deal with (A. 92, 173). He stated that the last strike had nearly made the Company bankrupt and that since then the plant had been on thin ice (A. 35, 46, 172); that Lindsay had made it clear that it wanted a profit and would not pour money into the Company if there was no return (A. 35, 46); that the Company had a second chance to grow through the merger with Lindsay, but it had to earn its way (A. 36, 173); that he hoped it could reach the point of obtaining new and modern equipment, but that Lindsay wouldn't pour money into the business if there was no profit (A. 35, 173). He stated there had been a sad Union experience that they knew of and

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[12] In 1952, when Petitioner reopened its plant during the strike, employees were told that they would be compensated on the basis of Petitioner's last offer to the AWWPA (A. 91). This is how the piece work system, which was criticized by Mr. Sinclair came into being (A. 91).

that he didn't want to be in the position where, if the Union made unreasonable demands upon the Company which it could not meet the Union would strike and put the Company back in the same situation as in 1952 and with which it had been struggling ever since (A. 36, 90). Mr. Sinclair said that their craft was a small one; that it would be difficult to find jobs, as it was not like finding a job as a machinists; that younger and better educated people were available; and that several of them were over 60, which was a difficult time to start again (A. 35, 49).

President Sinclair told the Weaving Department that he had never heard of a Company that closed a plant; that he did not intend to close; that he had never heard of a Company that had called a strike; that strikes were initiated by Unions (A. 43, 172). He stated that strikes could be caused by a Company's inability to accede to Union demands; and that, if a Company and Union could not agree, that the Union's only answer was to strike or to accede to a settlement (A. 43, 51). Mr. Sinclair told the employees that there was a possibility that a strike could lead to closing the plant (A. 43, 60, 172).[13] Mr. Sinclair said that the last thing he wanted was a plant that was closed down, because "this was my life, too" (A. 58). He said that Petitioner could not accede to unreasonable demands (A. 46). He also stated that Petitioner was subject to foreign competition and that it was conceivable that, if the plant was closed, under any circumstances, some of the work would go to foreign companies, and that the Company had to handle foreign wires in the past (A. 50). Mr. Sinclair told employees that all they had to do was to look around Holyoke to see a lot of plants that were out of business (A. 65).

We proceed now to the discussion of the several different positions as to bargaining unit taken by the Union.

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[13]This had almost happened in 1952 when the Company nearly went bankrupt (A. 35, 44). Because of this history, Mr. Sinclair was very much concerned about strikes and made a point to inform his employees in both talks of his concern over the possibility of the plant closing because of a strike (A. 60).

(2) *The First Recognition Demand by the Teamsters Was in August for a One Plant Production and Maintenance Unit.*

As shown above, the initial letter (G.C. Ex. 3; A. 6, 108) was sent to all of the Company's Appleton Street employees by the International Union. The "authorization" card was for the benefit of the International and of such local as the International might "designate or charter" (G.C. Ex. 4; A. 6, 109).

On August 17 the International Brotherhood of Teamsters, through its Cleveland Attorney, Calvin L. McCoy, made an oral demand for recognition on behalf of the International upon Cleveland Attorney V. Jay Einhart (G.C. Ex. 7; A. 8, 112; G.C. Ex. 8; A. 9, 114; A. 30).[14] Mr. Einhart was counsel for Lindsay (G.C. Ex. 8; A. 9, 114; A. 30). A majority was claimed in a unit "comprised of about eighty-seven (87)" employees at the Appleton plant only (G.C. Ex. 7; A. 8, 112; G.C. Ex. 8; A. 9, 114).[15]

At that time Mr. Einhart did not represent the Petitioner (A. 30). President Sinclair learned of the request on or about August 17 (A. 95). He thought it was strange (1) that he had not received any request from anyone in the Holyoke area (A. 30) and (2) that a production and maintenance unit of eighty-seven (87) employees was being requested (G.C. Ex. 8; A. 9, 114; A. 31, 32). That figure included everyone working for the Company, except very top management (A. 31, 80). In August the Company's total em-

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[14]It was stipulated that Attorney Calvin L. McCoy represented the International Brotherhood of Teamsters (A. 8, 9).

[15]At that time the Company's Foundry Division employees had not been contacted by the Union. This was not done until after the petition had been filed by the Union in Case No. 1-RC-8664. In this regard see General Counsel's Exhibit 6 (A. 8, 110) which refers to an election petition having been filed for Appleton employees and which invites the foundry employees to participate. It was stipulated that this Exhibit was sent to employees between October 29 and November 2 (A. 8).

ployment, including the President, was 93 or 94 (A. 81). At that time, there were approximately sixty-five (65) production and maintenance employees (A. 81).[16]

Because of the discrepancy of at least twenty-two (22) employees, or one-third (1/3) more than were actually employed, President Sinclair had doubts about the validity of the bargaining request (A. 31, 81, 95; R. 230). After consultation with officers of Lindsay, Mr. Sinclair decided to refuse recognition (A. 31). Because of the large discrepancy in numbers among such a small group of employees, he did not believe that the Union represented the employees. "I didn't even feel that they could know a great deal of my Company, never mind representing them" (A. 31). As a result, Mr. Einhart wrote the letter of August 20 (G.C. Ex. 7; A. 8, 112) and denied the recognition demand. Following the July talk and through the approximate six (6) week period ending on August 20, Petitioner did not communicate with its employees concerning Union matters.

No further steps were taken to pursue this request for recognition. Obviously, the demand was abandoned and withdrawn. No attempt was made at the hearing to establish that the August 17 claim of majority was a truthful one or that the unit requested was appropriate, nor was any charge ever filed with respect to Petitioner's refusal.

(3) *The Union Reversed Its Course in a Second, Ambiguous Recognition Request.*

On September 20, Teamsters Local 404 demanded recognition in a unit of "Journeymen-Wireweavers and *Apprentices*" (G.C. Ex. 9; A. 10, 115; A. 31, 32). The Company had not employed an apprentice since 1952, a period of thirteen (13) years (A. 7, 32, 73, 81, 82)! This was the Company's first contact with Teamsters Local 404.

[16]The Company's operations are conducted in two (2) buildings, one located at 60 Appleton Street and the other at 115 Park Street (A. 95). There is a non-ferrous foundry at Park Street, and the Company builds shipping boxes there. The weaving operations and all other operations are conducted at Appleton Street (A. 95).

President Sinclair did not know whether the Union had reference to helpers or whether the Union was referring to seamers, finishers and mechanics in addition to helpers (A. 32, 33, 81, 96). Many people are employed in connection with wire cloth (A. 32, 33) and helpers assist weavers, not apprentices (A. 74). He assumed that the Union was talking about the other classifications of the Weaving Department (A. 32, 33, 96).[17]

Accordingly, President Sinclair replied to the Union by his letter dated September 28 (G.C. Ex. 11; A. 10, 118). In his letter, he denied recognition, among other reasons, because of the Company's good faith doubt that Local 404 of the International Brotherhood of Teamsters:

> "represents an uncoerced majority of its *weaving department* employees." (G.C. Ex. 11; A. 10, 119)

The Union failed to clarify its recognition demand in any way after receipt of General Counsel's Exhibit 11. The Company was, therefore, justified in considering that the Union's demand related to all of the Weaving Department employees and not to journeymen only, as the General Counsel contended.[18]

During the period from the August 17 demand through September 28, Petitioner did not communicate with its employees concerning Union matters.

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[17]There is no record evidence to establish the Trial Examiner's statement (A. 193) that "Sinclair very well knew what an apprentice wire weaver was" or his conclusion that the alleged "argument" was specious. Sinclair testified that he knew who his wireweavers were (A. 33). He also testified that he "did not know who the . . . *Union* might be referring to when they specified wireweavers and apprentices" (A. 33).

[18]In a notice posted on employee bulletin boards on October 21 (Resp. Ex. 15; A. 97, 158), the Company stated: "Local 404 originally requested recognition for employees in our '*Weaving Department Only*'. We denied this request because we felt then, as now, that all of our employees should have something to say about whether or not our plant becomes unionized" (A. 159).

(4) *The Third Recognition Demand and the Filing of the First Representation Petition Constituted an Abandonment and Withdrawal of the Second Request of September 20.*

Having reversed course in its second recognition demand, the Union reversed course again. It did not follow up the Company's letter of September 28, or clarify its position in any way. Instead, on or about October 11, the Union mailed a third (3d) recognition demand to Petitioner (G.C. Ex. 12; A. 11, 119).

In its third demand, the Union stated that it was "supplementing" its letter of September 20, which was limited to a "special group" of employees at the Appleton Street plant (G.C. Ex. 12; A. 11, 119, 120). This time the union specified classifications and departments of employees, which it claimed to represent at the "Appleton Street plant", as follows:

weave shop	finishing room
maintenance	dandyroll
machine shop	cylinder
shipping room	water mark (A. 120)

The foundry division, which is plainly noted on the Company's stationery (G.C. Ex. 14; A. 11, 123) and of which the Union must have had knowledge, was not mentioned!

Its October 11 letter (G.C. Ex. 12; A. 11, 119) states:

> "We therefore request recognition as the exclusive bargaining representative of the Employees identified in paragraph three (3)." (A. 120)

President Sinclair replied to the Union's letter on October 21, denied recognition (G.C. Ex. 13; A. 11, 122) and stated:

> " . . . We are pleased to note that Local 404 has followed the election procedures established by the Board as evidenced by its petition which has been docketed Case No. 1-RC-8664." (A. 122)

The Union's representation petition was filed on October 13 and was assigned by the Regional Director to Field Examiner Francis V. Paone (Resp. Ex. 1; A. 86).[19]

The Company rejected the demand for recognition because of the exclusion of the foundry employees and because President Sinclair believed that all production and maintenance employees should be included in the unit (A. 96). Simultaneously with sending the letter of October 21 (G.C. Ex. 13; A. 11, 122), President Sinclair prepared the first written Notice to Employees (Resp. Ex. 15; A. 97, 158).[20]

In the notice, President Sinclair referred to the Union's election petition and to the bargaining unit sought by the Union. The notice continued:

> "Local 404 would apparently exclude our foundry employees. We firmly believe that if any election is held it should include *all* of our production and maintenance employees and we have made our position clear to the NLRB." (A. 158)

During the period from the second recognition demand of September 20 to October 21, Petitioner's only communication with its employees concerning Union matters was the above-mentioned notice (Resp. Ex. 15; A. 97, 158). *This was Petitioner's first communication with its employees concerning Union matters since the July talk, a period of more than three and one-half (3½) months.*

Subsequent to the filing of the representation petition on October 13 (Resp. Ex. 1; A. 86), an "organizing Committee", composed of employees Brunault and Bougie, sent

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[19]Respondent's Exhibit 1 has not been printed in the Appendix.

[20]This notice and others which were received in evidence were posted at both the Appleton and Park plants and were seen by all employees (A. 96, 97). The notices, including this one, were posted from three (3) to four (4) days (A. 96, 97).

a letter to foundry employees urging them to sign authorization cards which were enclosed (G.C. Ex. 6; A. 8, 110).[21] The letter included a "brief summary" of benefits which the Union would negotiate for. Some of the expected contract demands were: Jury duty benefits; minimum hiring rate of $2.10; funeral benefits; seniority benefits; and a pension plan providing $150.00 per month after three (3) years' service (A. 110, 111).

Significantly, the employees were asked to mail the authorization card; were told that the card "will *not* be seen" by the Company and that:

> "We expect the *voting* to take place within the next two weeks. *This will be a secret ballot*" (A. 222).

On October 21 a list of the Company's production and maintenance employees, which included nine (9) foundry employees who were indicated by an asterisk, was mailed to the Board (Resp. Ex. 8; A. 87). That list included sixty-two (62) employees.[22]

Subsequently, on November 2, a meeting was held between Board Representative Paone; Mr. Napoli, the Union's President and Business Representative; President Sinclair and and the Company's counsel, Mr. V. Jay Einhart (A. 37, 97, 98). The Union agreed that its recognition request and petition were for an inappropriate unit. A Stipulation For Certification Upon Consent Election was signed by the parties for a production and maintenance unit, *which included the foundry employees* (Resp. Ex. 2; A. 86, 147). It was also signed by and recommended by Board Field Examiner Frances V. Paone (Resp. Ex. 2; A. 86, 147). This represented the *fourth (4th)* position taken by the Union with

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[21] It was stipulated that the Organizing Committee's letter was sent to employees between October 29 and November 2 (A. 8). Petitioner was notified of the Committee's existence by letter of September 24 (G.C. Ex. 10; A. 10, 117).

[22] The list of names has not been printed in the appendix.

respect to its representative interest and the appropriate unit.

Also on November 2, President Sinclair posted a notice to employees announcing the election details and the voting hours at both the Appleton Street and the Park Street plants (Resp. Ex. 16; A. 98, 159). The agreed election date was November 19 (Resp. Ex. 2; A. 86, 147; Resp. Ex. 16; A. 98, 159).

On November 2, Petitioner sent to its employees its first letter notifying them of the election and discussing certain questions in connection therewith (G.C. Ex. 14; A. 11, 123). On November 5, a *second* letter was sent by petitioner to its employees (G.C. Ex. 15, A. 121, 127). Petitioner's financial condition was the principal subject discussed in this letter.

(5) *The Union Again Reversed Course and Abandoned and Withdrew Its First Petition and Its Recognition Requests.*

On Friday, November 5, the Company received a telegram advising that the Union had requested permission to withdraw the petition in Case No. 1-RC-8664 (Resp. Ex. 4; A. 86, 151). A telegram was sent by the Union to the Board's Regional Director on the same date, requesting such withdrawal *without prejudice* (Resp. Ex. 3; A. 86, 150); but this was not communicated to the Company (Resp. Ex. 4; A. 86, 151).

On Monday, November 8, Petitioner's counsel telephoned the Regional Director and objected to the withdrawal of the petition in Case No. 1-RC-8664 without prejudice (A. 107). He was informed merely that the withdrawal request was received prior to the Regional Director's approval of the proposed Stipulation (A. 107). No contention was raised that the unit was in any inappropriate or that in any respect the Stipulation failed to accord to employees the full measure of their rights under the Act. The only thing before the Regional Director was a naked request for with-

drawal, together with a statement that a "new petition in a smaller unit" would be filed, obviously based upon the Union's supposed extent of organization (Resp. Ex. 3; A. 86, 150).

On the same date, November 8, the Regional Director granted the telegraphic request to withdraw without prejudice by a letter, which stated it was Board policy to allow such withdrawal inasmuch as the Stipulation had not been approved by him prior to receipt of the Union's request (Resp. Ex. 5; A. 87, 152). Six (6) days had elapsed from the signing of the Stipulation! *No explanation for the delay was offered by the Regional Director, the Board or its General Counsel.* On November 9, the Regional Director sent a *second letter* in which he advised that the petition in Case No. 1-RC-8664 had, with his approval, been withdrawn without prejudice (Resp. Ex. 7; A. 87, 154). No reason for the second letter had been advanced.[23]

On November 8, Petitioner posted a Notice to its employees informing them that the Teamsters were "backing out" of the written election agreement. It further stated:

> "This is about the fourth time that the Teamsters Union has changed position concerning which of you it would like to represent. We don't know what the Union's next move will be, but when it occurs, we will keep you fully advised." (Resp. Ex. 17; A. 99, 160)

No attempt was made by the Board to establish that the October 11 claim of majority representation was a truthful one or that the unit requested on October 11 was appropriate, nor was any charge ever filed with respect to Petitioner's refusal.

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[23]In this regard, the Court should note that General Counsel contended that there was "nothing pending" after the Union withdrew its petition in Case No. 1-RC-8664 (A. 56, 83).

(6) *The Union Made No Further Demand for Recognition But Instead Filed a Second Representation Petition.*

On November 8, concurrently with its approval of the Union's action in backing-out of its prior agreement, the First Regional Office of the Board received and permitted the filing of the petition in Case No. 1-RC-8713 (G.C. Ex. 1(a); A. 4).

The Union *made no demand upon the Company for recognition* prior to filing its *second* petition. Even though the ambiguity of such a request had been called to the Union's attention, the Union requested a unit of "*Apprentice* and Journeymen Wire Weavers" but specifically requested the exclusion of all other employees at both the Appleton and Park Street plants (G.C. Ex. 1(a); A. 4). The petition alleged that fourteen (14) employees were involved. Respondent's journeymen numbered fourteen (14) (A. 161; G.C. Ex. 5; A. 7). This was the *sixth* position taken by the Union with respect to representation of the Company's employees.[24]

President Sinclair believed, in view of the automation that had occurred with respect to the looms which were operated by wire weavers, as set forth *supra*, p. 5, that the appropriate unit should include all production and maintenance employees (A. 106). Petitioner's counsel reported that the Board's Regional office now advised that a unit limited to journeymen only would be considered appropriate by the Board (A. 100, 101, 106).[25] In view of that development, Petitioner did not demand a hearing or make

[24] On November 9, Petitioner posted a notice to its employees advising them of the filing of the Union's *second* petition. It stated; "The Union has now come 'full circle' in their efforts for recognition" (Resp. Ex. 18; A. 100, 161).

[25] There was no occasion to discuss this issue with the Board in connection with the September 20 demand, since it was not pursued by the Union, and the first petition was filed for an entirely different unit.

any attempt to delay. Instead, it reluctantly agreed to a unit consisting of journeymen weavers only (A. 106). In this regard Mr. Sinclair testified "so there seemed to be no sense in arguing about it" (A. 101), and "there was nothing I could do about this" (A. 106).

No conference was held. A proposed Stipulation for a unit of journeymen only was mailed to both parties on November 22 after telephone calls (Resp. Ex. 11; A. 88, 155). Mr. Sinclair was absent when the Stipulation was received; and he authorized Fred Greene, Production Manager, to sign it on behalf of the Company, so that there would be no delay (A. 101). The Stipulation was executed by the Union on November 23; by the Company on November 24; and was approved by the Acting Regional Director on November 26 (G.C. Ex. 1(b); A. 4), this time within two (2) days after the Company had executed and mailed it.

The Union's agreement to this (second) Stipulation constituted the *seventh* position taken by it with respect to the Company's employees.

The unit which was agreed upon in the Stipulation (G.C. Ex. 1(b); A. 4) is a unit for which *the Union never made a demand for recognition.*

On November 29, the Company posted a notice to employees (Resp. Ex. 19; A. 100, 161), which stated the following, among other things:

> "Although we still feel strongly that all of our production and maintenance employees should have the right to vote in any Labor Board election, we were advised by the Board that an election could properly be held among our wire weavers." (A. 161)

It was also stated that, even though the election might have a serious effect upon their future at Sinclair, employees, other than weavers, would have no right to vote (Resp. Ex. 19; A. 100, 161). This was the last bulletin board notice posted by Petitioner.

C. Petitioner's Communications With Its Employees Subsequent to July.

Following the July talk, the Company engaged in no communications with its employees until the posting of its notice on October 21 (Resp. Ex. 15; A. 97, 158). The only possible exception to the above statement were conversations between President Sinclair and individual employees. In that regard, the Trial Examiner found that President Sinclair talked to ten (10) of the fourteen (14) weavers individually on unspecified dates between July and December 9 at their work stations (A. 65, 182). The specific content of these discussions was not litigated, except for one with Richard Bougie, a member of the Union's Organizing Committee (A. 182, 183). The "discussion" consisted of President Sinclair's statement of a willingness to answer questions concerning the Company's position (A. 66). Only "some" of the employees asked questions (A. 66, 79). The Trial Examiner found it was "unnecessary to consider and to pass upon" the contention that the individual discussions violated the Act (A. 184).[26]

Subsequent to the October Notice (Resp. Ex. 15; A. 97, 158), Petitioner posted Notices on November 2 (Resp. Ex. 16; A. 98, 159); on November 8 (Resp. Ex. 17; A. 99, 160); on November 9 (Resp. Ex. 18; A. 100, 161) and on November 29 (Resp. Ex. 19; A. 100, 161).

As shown above, Petitioner's first letter to its employees was sent on November 2 (G.C. Ex. 14; A. 11, 123). It referred to the then scheduled election of November 19 (A. 123). The letter raised and answered a number of questions concerning voting procedures, union shop, job security and Teamster promises (A. 123). It stated that *Petitioner would bargain in good faith*, if the Teamsters won an election, but because of its precarious financial position, "we will not

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[26]Nevertheless, the Court of Appeals appears to have relied upon the individual discussions as a basis for affirming the Board's order of violation of Section 8(a)(1) (A. 209).

agree to any increase in costs which can put us out of business" . . . "it just doesn't make sense for us *to meet unreasonable* Union demands *which will result in further losses* and eventually the necessity of closing the plant" (A. 126). It stated that the Teamsters Union could not increase job security (A. 124, 125). It further stated that Lindsay would not "continue to subsidize a losing operation"; that it had a right to expect profits; that true job security depended upon "our ability to operate this plant at a profit"; and that if Lindsay had not purchased the plant "it is entirely possible that we would no longer be in business" (A. 125).

Petitioner's second letter was dated November 5 (G.C. Ex. 15; A. 12, 127). President Sinclair reviewed Petitioner's history, including the 1952 strike, which led to its accumulations of debts, which, in turn, forced it to sell control to Lindsay. Its relationship with Lindsay was discussed, inter alia, that Lindsay "made it clear that Sinclair must make a profit" (A. 128); that Lindsay had no ties to Holyoke (A. 128); that a strike threat would not cause Lindsay "any loss of sleep" (A. 129). President Sinclair stated that the Teamsters promised a lot "but what can they deliver except pressure—the threat of a strike" (A. 128). The letter continued that a "long strike" would be bad for President Sinclair because he wanted to "continue to live in Holyoke", had pride in the Sinclair name, "and would like to see the plant modernized, expanded and prosper" (A. 129). He emphasized the right of employees to make their decision individually. "No one has a right to threaten you, or coerce you to make you vote their way" (A. 129). Employees were urged to vote (A. 120).

A third letter on November 22 (G.C. Ex. 16a; A. 12, 129) merely stated that a copy of Senator Robert Kennedy's book entitled, "The Enemy Within" (G.C. Ex. 16b; A. 12), was enclosed and suggested that employees read it (A. 129, 130).[27]

[27]In November the Teamsters distributed a book to employees entitled, "Hoffa, Ten Angels Swearing", by Jim Clay (G.C. Ex. 22; A. 15).

An undated handbill captioned, "Who Would Buy The Groceries . . . While You Walk The Teamsters Picket Line" was distributed between November 18 and November 25 (G.C. Ex. 21; A. 14, 143). President Sinclair discussed Petitioner's policy of treating all employees alike and stated that it was prohibited, during a Union organizing campaign, from making any changes in wages or other benefits (A. 144). He discussed the 1952 strike, stated that he had no hopes that the Teamsters, a strike-happy outfit, would not call a strike (A. 144). He quoted Teamsters President James R. Hoffa, who had stated that the Teamsters "would expect all (telephone) installers to be ready to wage (a six- or nine-months' strike) with the employers, or not come into the Teamsters" (A. 144). Also discussed were employees' rights in voting in an NLRB election and their rights in the event of a strike (A. 145). The first page shows a Teamster picket in front of the plant (A. 143) and two other cartoons appear on the final page (A. 145).

On November 30 a fifth letter was sent (G.C. Ex. 17; A. 13, 130). The sale of Petitioner to Lindsay was laid to the 1952 strike and the ensuing financial difficulties (A. 130). The differences between the 1952 situation, when Petitioner was family owned, and the present situation were pointed out (A. 130, 131). The letter continued by pointing out that the Teamsters Union could not solve the problems facing the Company; that the Teamsters could make "big" demands that the Company could not meet; and that the Union's only weapon to "enforce its 'big' demands" was a strike (A. 131). The following was also stated:

> "This Company is *not anti-union.* We would not close the plant *in retaliation for employees voting for a Union.* But this Company must show a profit, *regardless* of whether or not you select the Teamsters Union as your spokesman." (A. 132)

The letter continued by stating that real job security depended upon profits and not upon Teamster Union pressure or promises. Employees were encouraged to make their own decision and to "vote without fear" (A. 132).

A sixth letter, on December 1, suggested that every organization mirrored and reflected the character of its leaders and top officers (G.C. Ex. 18; A. 13, 133). The criminal convictions of Teamster "Top Officers" David Beck and James R. Hoffa were discussed (A. 133). Also referred to were Senator Robert Kennedy's book, "The Enemy Within", newspaper and magazine articles by Senator McClelland, Chairman of the Senate Labor Racketeering Committee and testimony before that committee (A. 143). It was stated that it would be difficult to get another election to vote the Teamsters out (A. 135). Also discussed was the use of dues by Teamster President Hoffa and by lesser Union officials to finance their defenses in criminal court (A. 135). Employees were reminded that only they could decide whether they wanted to become Teamster members (A. 135, 136).

On December 7, a seventh letter was sent to the employees (G.C. Ex. 19; A. 13, 137). It included a graveyard cartoon with the Teamsters about to bury the Company (A. 137). It refers to the Holyoke-Springfield industrial graveyard of Companies that had died under Union pressure (A. 137). Twelve (12) companies that had gone out of business in the area were listed, together with the number of jobs that were lost (A. 138). The letter stated that these companies had needed higher production and better quality, but that the "Union Doctors" gave them "bloodletting strikes, restricted production and higher labor costs" (A. 138). It was pointed out that everyone in the area had been hurt as a result; that Unions had done nothing to promote sound industrial growth in the area; and that "real job opportunity is based upon the profit and loss picture of the employer" and not on "hot air" union promises (A. 138). There was a review of Petitioner's history: the bankruptcy of Buchanan and Holt, the 1952 thirteen week strike disaster from which the Company never recovered and which compelled the sale of the Company (A. 139). Against this background, President Sinclair stated, "dreams of 'Union miracles' can be dangerous to your real job security" (A.

139). He stated that he did not "know what the future holds for any of us", urged employees to drive past a few of the vacant area plants and urged them to vote and to make their decision. The final page carried photographs of closed plants with the caption, "Unions Furnished No Job Security Here" (A. 140).

The December 8 handbill severely criticized the Teamsters for using Union funds to defend James Hoffa in criminal proceedings and for paying a pension and furnishing a home for former President David Beck (G.C. Ex. 20; A. 14, 141). It refers to the Teamsters expulsion from the AFL-CIO because of "racketeer" domination. Advantages of voting "NO" in the election were stressed (A. 141).

Petitioner's final communication with its employees was a talk by President Sinclair on December 8, which he read from notes using connecting words (Resp. Ex. 20; A. 102, 162; 84, 102-105). At the outset, Sinclair emphasized that the decision was that of the employees and that no one could threaten or coerce them (A. 162). He reviewed labor racketeering charges against the Teamsters and said that there were a "lot more important things" than who represented the employees; that he promised nothing; that the Company would not have been sold if it had been making a lot of money (A. 162).

President Sinclair again emphasized the necessity of profits so that everyone; including himself, would have a job; the "Teamsters Union has nothing to do with it" (A. 163). He reiterated that the Teamsters could do nothing about the Company problems, could make demands that could lead to larger losses; could call a strike and that the new owners would not be concerned (A. 163). He expressed his belief that the Teamsters also would not be concerned about whether Petitioner stayed in business or not (A. 163).

President Sinclair said it made "a hell of a lot of difference to you and to me"; that he would not blacklist anyone if the plant was "closed by a strike" but that it would be difficult to find other jobs (A. 164). He stated:

> "I can't promise you anything except that I'll do my level best to keep Sinclair Co. in business and growing. That's important to Dave Sinclair because its his job too . . . I'm not concerned with beating a union–I'm concerned with our future." (A. 165)

D. The Election and Subsequent Proceedings

The election was held on December 9, and the employees voted against the Teamsters by a vote of 7 to 6 (A. 166, 169, 188).

The Teamsters filed Objections to the Election on December 14 (G.C. Ex. 1(c); A. 4). The Regional Director issued his Report on Objections on January 20, 1966, recommended that the Objections be overruled and that a Certification of Results be issued (G.C. Ex. 1(d); A. 4). With respect to the December 8 talk, the Regional Director found that Petitioner:

> "'set forth its economic and competitive position in the industry and presented this information in a non-coercive manner'. *Freeman Manufacturing Company*, 148 NLRB 577 at 581, 582." (G.C. Ex. 1(d); A. 4)

With respect to Petitioner's letters, the Regional Director found:

> "There is no evidence, however, that these statements were other than factual in character and such matters certainly were relevant to the election issues before the employees. The entire 'literature' could, as already pointed out with respect to the Employer's speech . . . clearly be evaluated by the employees as campaign propaganda." (G.C. Ex. 1(d); A. 4)

The Union filed exceptions with the Board and on March 8, 1966, the Board directed a hearing with respect to the objections to the election (G.C. Ex. 1(e); A. 4).

Concurrently with the filing of the Objections on December 14, the Teamsters filed a Charge alleging violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5) (G.C. Ex. 1(f); A. 4).

On January 20, 1966, the Regional Director refused to issue a Complaint (G.C. Exs. 1(d) and 1(h); A. 4). The Union requested review (G.C. Ex. 1(i); A. 4); and on June 21, 1966, the Regional Director notified the parties that he would issue a Complaint only with respect to the 8(a)(1) allegations of the Charge (G.C. Ex. 1(j); A. 4). On July 5, 1966, the Board's Office of Appeals ordered that a Complaint also be issued with respect to the alleged Section 8(a)(5) violations (G.C. Ex. 1(k); A. 4). On July 22, 1966, an order consolidating cases, Complaint and notice of hearing was issued (G.C. Ex. 1(1); A. 4) [28] and subsequently a hearing was held (A. 2).

After the hearing, the Trial Examiner found that Petitioner had not engaged in the conduct specifically alleged in Complaint paragraphs 14(a)—alleged threat; 14(b)—alleged interrogations; and 14(c)—alleged interference with a Union meeting. The remaining allegations of the Complaint claimed that Petitioner had "threatened its employees" with nine (9) generally alleged "misrepresentations" and that the effect of Petitioner's "total acts and conduct . . . was to create a coercive atmosphere" (G.C. Ex. 1(1); A. 4). Although he did not find any specific "misrepresentations", nor did he specifically find a "coercive atmosphere", the Trial Examiner nevertheless ordered the election set aside and recommended a bargaining order.

E. The Board's Decision and Order

Except for two (2) modifications in the breadth of the Order (A. 203), the Board adopted the findings, conclusions and recommendations of the Trial Examiner (A. 203). Although it had approved a Stipulation that a question of representation existed and had conducted an election, it now ruled that the election should never have been held and ordered Petitioner to recognize and bargain with the Union

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[28] The dismissal order with respect to the alleged violation of Section 8(a)(3) of the Act was not disturbed.

(A. 199, 203).[29] It made no finding that any one of Petitioner's communications to its employees was unlawful. Notwithstanding the First Amendment to the Constitution and Section 8(c) of the Act, it used Petitioner's communications with its employees in their totality as evidence of a violation of the Act and as the basis for the bargaining order. Although it found no threats of force or reprisal or promises of benefit, it ordered Petitioner to cease and desist from threatening its employees with possible plant closure, transfer of weaving production with attendant loss of employment or "with any other economic *reprisals*" if they *selected* the Union as their bargaining representative (A. 199, 203).

(1) *The Board's Ruling With Respect to Petitioner's Communications.*

With respect to Petitioner's communications with its employees, the Board made two (2) inconsistent findings. The *first* was that Petitioner's communications:

> "*Taken together and considered as a whole,* reasonably *tended* to convey to the employees the belief or impression that *selection of the Union* in the forthcoming election *could* lead Respondent to close its plant, or to the transfer of the weaving production, with resultant loss of jobs to the wireweavers. . . ." (A. 183)

The foregoing finding relates to a "possibility" of disadvantageous consequences as a result of selection of the Union. In its *second* finding, the Board piled inference upon inference in an attempt to convert the "possibility" into a "certainty", but it no longer depended upon "selection" of the Union:

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[29] Contrary to the Trial Examiner who recommended only that the election be set aside (A. 200), the Board dismissed the election petition in Case No. 1-RC-8713 and ordered that all proceedings held thereunder be vacated (A. 203).

> "But the message which the foregoing *preelection campaign* . . . reasonably *tended* to convey to the employees was that if they *selected this Union* as their bargaining representative, a strike *would* be inevitable because the Union *would* make excessive demands which Respondent *would* refuse to meet, that a strike *could* lead to the closing of the plant or the transfer of the weaving production to Lindsay's other facilities, and that the wire weavers *would* then lose their jobs and find it difficult to get other jobs because of their age and limited craft skills." (A. 184)

The Board in no way explicated the basis for its findings, contenting itself with basing them upon the alleged "totality" of Petitioner's communications (A. 183, 184, 204). The findings made by the Board largely consist of statements which must be conceded, even by the Board, to be protected under the First Amendment to the Constitution and by Section 8(c) of the Act. Such findings include, in their "totality", the finding that on November 22, Petitioner furnished each of its employees with a copy of Senator Robert Kennedy's Book, "The Enemy Within" (A. 176).

The Board relied only upon the *first* finding, set forth above, as the basis for setting aside the results of the election (A. 188). The Trial Examiner, doubtful of his conclusion that Petitioner's communications were violative of Section 8(a)(1) of the Act, assumed the contrary, *arguendo*, and nevertheless recommended setting aside the election, but *only* because Petitioner's pre-election campaign:

> " . . . *tended* to foreclose the possibility that the election issues will be decided on the basis of the employees' judgment as to whether the Union will be able to represent them effectively in light of existing economic conditions." (A. 189)

On June 16, 1967, more than a month after it issued its Decision and Order herein, the Board, without any request by Petitioner or any other party, voluntarily issued its Order Supplementing Decision and Order, which added a footnote

to its original Order and disclaimed any reliance upon Petitioner's distribution of "The Enemy Within" as "part of the *totality* of . . . conduct in violation of Section 8(a)(1) of the Act" (A. 204).[30]

(2) *The Board Ruled That There Had Been an Unlawful Refusal To Bargain.*

With respect to the allegations of refusal to bargain, the Board ignored all demands for recognition, except the *second* demand of September 20 and ignored the proceedings in connection with the representation petition filed in October (A. 191-193). It ruled upon the matter as though the September 20 demand and the representation petition of November 8 were the only facts in the case.

The Board found that Petitioner's unfair labor practices made "impossible the holding of a free election" (A. 191) and that there was, therefore,

> "*no alternative* but to look to the signed authorization cards as the only available proof of the choice employees would have absent the employer's unfair labor practices" (A. 191).

The only finding made by the Board to support the above conclusions was:

> "To the extent that the election revealed a loss of Union support, such loss *must* be found attributable to the (Petitioner's) unfair labor practices" (A. 191).

The Board then leaped to the conclusion that Petitioner's refusal to bargain on and after September 20:

> "was not motivated by any good-faith doubt as to the Union's majority status in an appropriate bargaining unit but was instead motivated by a desire

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[30]The Board did not rule upon Petitioner's contentions that its communications with its employees were protected by the First Amendment to the Constitution and by Section 8(c) of the Act.

to gain time within which to dissipate that majority status." (A. 195)

The Board did not rule upon Petitioner's contention that, by reason of the changes made in Section 9(c) of the Act by the Taft-Hartley Amendments (61 Stat. 143), among other things, deleting the Board's authority to "utilize any other suitable method" to determine a bargaining representative, that the Board did not have statutory authority to order bargaining based upon a card check, after it had resolved the question of representation by means of a secret ballot election.

F. The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order. It stated that the Board's order was based upon findings that Petitioner *threatened* its employees "that *unionization would* cause them to lose their jobs" (A. 205), and that there was a refusal to bargain in violation of the Act.[31] It held that the "basic question" was whether these findings were supported by substantial evidence on the record as a whole (A. 205).

(1) *The Court's Decision With Respect to Petitioner's Communications.*

With respect to Petitioner's communications, the Court relied upon findings which are substantially curtailed in scope from those relied upon by the Board. The Court impliedly sustained Petitioner's contentions that it made no untrue statements and that its statements, considered separately, were lawful (A. 209).[32]

[31] The Board made no finding that Petitioner threatened that unionization "*would*" cause employees to lose their jobs.

[32] The Court inaccurately held that the Board's findings "were based on the company's activities during the period from November 8, when the instant representation petition was filed, and December 9, the date the election was held" (Footnote 7 to the Court's Decision, A. 207).

Although the Court mentioned the tests set forth in Section 8(c) of the Act relating to promises of benefits or threats of force or reprisal (A. 209), it made no findings under those standards. Instead it turned to the language of Section 8(a)(1), which prohibits conduct by an employer:

> "to interfere with, restrain *or coerce* employees . . . "

The Court held that the test in considering "coercive effect" was the "totality of the circumstances" (A. 209). It held that:

> "Whether an employer has used language that is *coercive in its effect* is a question essentially for the *specialized experience* of the Board (A. 210).
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> * * *
>
> "On the record before us we think there is *substantial evidence* to support these findings." (A. 211)

The Court, therefore, as did the Board, applied the standards pertaining to a violation of Section 8(a)(1) of the Act and not the standards set forth in Section 8(c) thereof. Further, the Court, likewise, did not rule upon Petitioner's contention that its communications were protected by the First Amendment to the Constitution, nor did the Court review the factual findings for the Board's order as required with respect to an order restraining freedom of speech.

(2) *The Court's Decision With Respect to the Refusal To Bargain.*

With respect to the refusal to bargain issue, the Court found that the Board's finding of a violation of Sections 8(a)(5) and (1) of the Act was supported by substantial evidence (A. 211). It ruled that a good faith doubt was not established by assertion and that it must have some reasonable or rational basis in fact (A. 212):

> "Here the company made no attempt to discover what the card situation was when the union re-

> quested recognition for the wire workers unit. We therefore conclude that *the company* made no real showing of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit." (A. 212)

The Court found that instead of recognizing the Union on the basis of its "admitted" card majority, that Petitioner sought to gain time to dissipate the Union's majority (A. 212). The Court gave no recognition to the fact that such majority was not known to Petitioner until the hearing on October 4 and 5, 1966, and that no letters were sent to employees until November 2. It gave no consideration to the Union's false claim of majority representation in August, and it did not consider the abandonment by the Union of its September claim by the October demand and petition, and by its execution, in November, of a Stipulation for an Election in an entirely different bargaining unit.

The Court ruled that it had rejected the proposition, in the First Circuit, that authorization cards were so unreliable that an employer has a right to reject a request for recognition based upon them (A. 212); and that it was reasonable to conclude that the Union's majority had been dissipated by Petitioner's unlawful interference (A. 212, 213). The court did not discuss the effect of the Union's delays and its frequent changes of position nor did it rule upon Petitioner's contention that the change made in Section 9(c) of the Act by the Taft-Hartley Amendments (61 Stat. 143) prohibited the issuance of the Board's bargaining order.

These detailed facts raise the following ultimate questions:

(1) Did Petitioner's communications to its employees exceed the bounds of the First Amendment to the Constitution and the bounds of Section 8(c) of the Act so that the Board properly could use them not only as evidence of other unfair labor practices, but as an unfair labor practice in and of themselves, and as grounds for setting aside the results of the election? and,

(2) Was it *impossible* to conduct a fair election so that notwithstanding the provisions of Section 9(c) of the Act, as amended, the Board could exercise remedial authority, to impose upon employees a bargaining representative which they had rejected in a secret ballot election?

We will now argue the facts and law which show that both of such ultimate questions should be answered in the negative by this Court.

SUMMARY OF ARGUMENT

I

The Board's Order With Respect to Petitioner's Communications Is Not Supported by Specific, Reasoned Findings and Such Order Is Vague, Ambiguous and Non-Specific. Petitioner's Communications Are Within the Protection of the First Amendment and Section 8(c) of The Act, Whether Considered Separately or in "Totality". Such Communications Could Not Properly Have Been Found Unlawful Nor Used as Evidence of Another Unfair Labor Practice Nor as Grounds for Setting Aside the Election.

Petitioner was found guilty of no "conduct" in violation of the Act, other than the "totality" of its communications to its employees. Its "words" alone constitute the basis for the Board's findings of violation of Section 8(a)(1), and also constitute the "evidence" upon which the Board's order, directing Petitioner to bargain with the Union, is based. Petitioner's "words" also constitute the "evidence" upon which the Board set aside the results of the December 9 election which the Union lost.

The Board made a finding covering the period (1) from July through December 8 and other finding covering the period (2) only from November 8 through December 8, and in both cases found that the "totality" of Petitioner's com-

munications during each respective period violated Section 8(a)(1) of the Act. The Board made no finding that any *specific* statement made by Petitioner violated the Act. Petitioner's statements were not considered by the Board or the Court below under the standards set forth in Section 8(c) of the Act or under the constitutional standards enunciated by this Court. Rather, the Board's findings are based upon the alleged "totality" of Petitioner's "series of letters, pahphlets, leaflets and speeches . . . taken together and considered as a whole" (A. 83). In this situation, we make the following points:

(a) The Board's decision contravenes constitutional standards for specificity of findings with respect to orders which restrain freedom of expression. Whenever it is claimed that such liberties have been abridged, this Court has always closely examined the evidence to determine whether there is a forbidden intrusion on the field of free expression by improper characterization. *Wood v. Georgia*, 370 U.S. 375 (1962); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Further, this Court has held that ambiguous lines may not be drawn by decrees which restrict freedom of expression and that "precision of regulation must be the touchstone" in an area closely touching upon the precious liberty of freedom of speech. *NAACP v. Button*, 371 U.S. 415 (1963). The Board's order here, unsupported as it is by detailed and reasoned findings, is vague, imprecise and ambiguous and unlawfully restrains Petitioner's constitutional right of free expression.

(b) The Court of Appeals erred in failing to determine whether constitutional standards had been met, in failing to make a close examination of the evidence, and in enforcing the Board's order upon the standard of "substantiality of the evidence". Statutory presumptions must give way when the statute being enforced approaches the limit of constitutional power. *NLRB v. Golub Corporation*, 388 F.2d 921 (CA-2, 1967) 66 L.R.R.M. 2769; *Wood v. Georgia*, 370 U.S. 375 (1962); *Speiser v. Randall*, 357 U.S. 513 (1958). This

is not a case for application of the "substantial evidence" rule which relates to statutes, rather it is a case requiring the application of the free speech provisions of the Constitution. The Board's findings, which are based upon its *characterization* of admitted facts, were sustained by the Court of Appeals without any reference to constitutional standards.

(c) The Court of Appeals also erred in sustaining the Board on the basis of its so-called "expertise", even though the Board failed to set forth precise, relevant and reasoned findings which support its conclusion with respect to the Section 8(a)(1) violation found by it. The Court of Appeals did not uphold the order only "on the same basis articulated in the order by the agency itself" (371 U.S. at 169). Rather, it misstated the Board's findings and chose to make findings of its own, upon which it upheld the Board's order. The opinion of the Court below presents a startling example of the "monster" of "expertise", which was turned loose by the Court of Appeals to rule "with no practical limits on its discretion", *Burlington Truck Lines v. United States lines,* 371 U.S. 156 (1962). Such deference to "expertise" opened the door to a purely arbitrary exercise of administrative power in which the Board has made no specific findings, the burden of proof was not carried by the General Counsel, and all *ipse dixit* pronouncements by the Board went unchallenged. The Court of Appeals considered that the Board's "expertise" was so great that the controversy was at an end because the Board *said* there was a violation of the Act and because the Board *said* that a bargaining order remedy was required.

(d) Petitioner's specific statements dealt with its financial condition, with the 1952 strike, with its new association with Lindsay, with the possibility that the Teamsters might make unreasonable demands and force another strike, and with Teamster corruption. Petitioner's statements with respect to strikes to enforce unreasonable demands and the possible consequences thereof constituted a reasoned discus-

sion of Petitioner's financial position, its inability to meet unreasonable demands and the further fact that the Teamsters (not Petitioner) would have the option of insisting on such demands and that the Teamsters (not Petitioner) would have the option of striking to enforce such demands, with a resultant possibility of adverse consequences to all concerned. The Board failed to make any finding to show *how* these statements could possibly lose the protection of either Section 8(c) of the Act or the First Amendment, either standing alone or when combined with other statements.

(e) Petitioner's statements, therefore, considered alone, or as part of any totality in which the whole could conceivably be greater than the sum of all its parts, were protected by the First Amendment and by Section 8(c) of the Act. *Thornhill, v. Alabama,* 310 U.S. 229 (1963); *Linn v. United Plant Guard Workers of America,* 383 U.S. 53 (1966); *NLRB v. Exchange Parts Co.,* 375 U.S. 405 (1964).

(f) The Board's finding that Petitioner's communications were violative of Section 8(a)(1) of the Act and that such communications, therefore, also constituted *evidence* of a violation of Section 8(a)(5) of the Act and were also grounds for setting aside the results of the election of December 9 were contrary to law. In that particular respect, the Board's order is without legal foundation and should be set aside.[33]

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[33]The Board's further use of Petitioner's words as *evidence* (1) of Petitioner's lack of good faith doubt of the Teamsters' majority; (2) its lack of good faith doubt regarding the appropriate unit; (3) its intent to gain time to dissipate the Teamsters majority; (4) that such *words* caused the Teamsters to lose employee support; and (5) that such *words* also made it *impossible* to conduct a second election, thereby justifying a bargaining order, will be dealt with under Point II.

II

The Board's Order Requiring Petitioner To Bargain With the Union Is Unsupported in Fact and in Law and Should Not Have Been Enforced by the Court Below.

The Board's Order requiring Petitioner to bargain with the Teamsters should not have been enforced by the Court below.[34]

Petitioner's communications were used by the Board as the basis for its finding of a Section 8(a)(1) violation. This finding was then, in turn, *also* used by the Board:

(1) To prove a *past* state of mine, namely, that Petitioner did not have a good faith doubt regarding (a) the Union's majority status on September 20 or (b) the appropriateness of the unit; and

(2) To prove another *past state* of mind, *namely*, that on September 20 and thereafter Petitioner desired to gain time in which to dissipate the Union's majority; and

(3) To prove that *concurrently* with their issuance, Petitioner's communications caused the Teamsters to lose support among the employees; and

(4) To prove that *in the future*, it would be *impossible* to hold a fair election, thus justifying the Board's reliance upon authorization cards and its issuance of a bargaining order.

While deference ordinarily must be accorded to the Board's function with respect to fact finding, the Court below should not have accepted these *conclusions* by the

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[34] Consideration of this point by the Court would not be necessary if the Court sustains Petitioner's position that its communications were protected by the First Amendment and by Section 8(c). In that event, the Board's finding of violation of Section 8(a)(1) would fall, together with its finding of violation of Section 8(a)(5) and its ruling with respect to the election. However, we will assume that the Court will nevertheless want to consider Point II.

Board without the support of reasoned, precise findings to support them. The discussion *supra* with respect to the Board's "expertise" is applicable here. However, with respect to the issue concerning the bargaining order, we make the following points:

(a) Secret ballot elections are the method adopted by Congress for resolving questions of representation. The Taft-Hartley Amendments not only rescinded the Board's authority to certify a labor organization by "any other suitable method," but *also* rescinded the Board's authority to resolve such questions "either in conjunction with a proceeding under Section 10 or otherwise", as formerly provided under the Wagner Act (49 Stat. 453). Congress was concerned with "assuring complete freedom of choice to employees who do *not* wish to be represented collectively" (1 Leg. Hist. 409) and to do away with practices whereby employees who had "voted *against* the unions in the Board's elections" were still being subjected to union control (1 Leg. Hist. 298). The emphasis throughout the debates was upon "elections" and upon "certification" of representatives and even Senate opponents of the amendments concurred in the right of employers to demand "certification. . . whenever an *unrecognized* union claims the right to represent employees (2 Leg. Hist. 1452, 1453). The Board's decision here is contrary to Congressional intent.

(b) The Board's decision attempts to give binding effect to authorization cards signed by employees. It ignores the overwhelming evidence shown by its own decisions in bargaining order cases that employees, not aware of the "technicalities" followed by the Board with respect to cards, are substantially misled by Union organizers during an organizing campaign. For example, employees have been told that the card will be "secret," but it is offered in evidence; they have been told that the card is needed for an election, but it is used instead to support a bargaining order. A wide range of social pressures is used to coerce the signing of cards, yet the Board considers the card valid. And at times,

overt threats have been known. When an employee believes an election is forthcoming, he may avoid the pressures, secure in the belief that he will be able to vote his conviction. "Laboratory conditions" are totally lacking in this atmosphere. An employer faced with a demand for a card check has no assurance. A mere check of cards against payroll not only does nothing to allay these suspicions, but brushes them aside as irrelevant and would require the counting even of forged cards. To conduct an investigation means to run a substantial risk of violation of Section 8(a)(1). Finally, the Board's own representation case records affirmatively show that even when a substantial majority of employees have signed cards, this does not represent the true wishes of employees. It is against this background that Petitioner rejected the demand for a mere check of the Teamsters cards against its payroll.

(c) The Board found that Petitioner did not have a "good faith doubt" on September 20 regarding the Teamsters' majority status or the appropriate unit. The Union twice entered into Stipulations that a question of representation had arisen. The Board approved the second such Stipulation on November 26 and an election was held December 9 to resolve the question. At least when an election has been held, the question of the employer's good faith doubt or lack thereof is irrelevant. The proper inquiry should have been whether facts had occurred, after the execution and approval of the second Stipulation, to justify relieving the Union from its second Stipulation to resolve the question of representation by the election. No such inquiry was made by the Board; but after concluding that Petitioner did not have a "good faith doubt" on September 20, it found that such issue was irrelevant. The Court of Appeals, nevertheless, enforced the Board's order with respect to "good faith doubt" and erroneously placed the burden of proof regarding this issue upon Petitioner.

(d) Assuming, *arguendo*, its relevance to the bargaining order issue, the only evidence supporting the Board's con-

clusion that Petitioner had no good faith doubt on September 20 is the Board's finding that Petitioner's communications violated Section 8(a)(1) of the Act. The Board ignored large parts of the record and failed to show by reasoned findings how the alleged Section 8(a)(1) violation *also* supported its conclusions with respect to Petitioner's lack of good faith doubt.

(e) Based upon its finding of a violation of Section 8(a)(1), the Board held that such finding also supported the conclusions (1) that Petitioner's communications caused the Union to lose support among the employees; and (2) that Petitioner sought to gain time in which to dissipate the Union's majority; and (3) that it was "impossible" to conduct a fair second election. Regardless of the Boards so-called "expertise" and its "discretion" in selecting remedies, that discretion must be based upon analysis of evidence and reasoned findings which support the conclusions reached. Both are absent here. The Court of Appeals erred in accepting the Board's *ipse dixit* with respect to the above three (3) conclusions.

(f) The Board's bargaining order is without support in law and should, in any event, be set aside.

ARGUMENT

I.

The Board's Order With Respect to Petitioner's Communications Is Not Supported by Specific, Reasoned Findings and Such Order Is Vague, Ambiguous and Non-Specific. Petitioner's Communications Are Within the Protection of the First Amendment and Section 8(c) of The Act, Whether Considered Separately or in "Totality". Such Communications Could Not Properly Have Been Found Unlawful Nor Used as Evidence of Another Unfair Labor Practice Nor as Grounds for Setting Aside the Election.

A. Introduction

As shown above, Petitioner was found guilty of no "conduct" in violation of the Act other than its communications to its employees, that is, its "words" alone constituted the basis of the Board's order.[35] The Board made no distinction between any of the statements set forth in its findings of fact, which constitute merely a recitation and characterization of certain statements and phrases carefully excised from their background and context. The Board did not even attempt to show that any individual statement or expression made by Petitioner was unlawful. The Board concluded that the entire "series of letters, pamphlets, leaflets, and speeches . . . taken together and considered as a whole . . . violated Section 8(a)(1) of the Act" (A. 183). The Board made one finding which covered Petitioner's com-

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[35] Manifestly, this Court's "totality" holding in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1949), would have no application here. There this Court enunciated its "totality of conduct" rule and held that the Board "could properly consider . . . what the Company said *in conjunction with what it did*" (314 U.S. at 478). Compare *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), where this Court placed no reliance upon the Employer's statements "dissociated from its conduct" (375 U.S. 410).

munications during the entire period from July through December 8. It made another finding that Section 8(a)(1) was violated by only those communications which were issued by Petitioner during the period from November 8 through December 8 (A. 183).[36]

Obviously, in the Board's view, no separate or individual statement made by Petitioner was unlawful. In any event, the Board made no such finding. The Court of Appeals agreed, impliedly at least, that when Petitioner's letters, leaflets and speeches were considered separately, they were lawful and protected.[37] The Board's conclusion, therefore, is that the whole is greater than its parts and that lawful individual statements may be added up to an unlawful totality meriting proscription. The Board's order, therefore, directed as it is toward the "totality" (A. 204), must necessarily prohibit the free expression of utterances which are, in themselves, lawful and protected.

The lengths to which the Board has gone in the instant case is shown by the action of the Trial Examiner in including, within the unlawful "totality", the distribution of Senator Robert Kennedy's book, "The Enemy Within" (A. 176), even though this book is available to the public generally. The Board adopted the Trial Examiner's finding and, only after adverse newspaper publicity, did the Board, some six (6) weeks later, finally remove the distribution of that book from consideration as part of the "totality" of unlawful conduct (A. 204).[38]

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[36]The Court of Appeals erroneously held that the Board's findings were based only upon the communications issued during the period from November 8 through December 8. It sustained the Board's order upon that erroneous assumption (A. 207, Footnote 7).

[37]The Court of Appeals stated that Petitioner had contended "that these statements considered separately are lawful and this being so, the combination of them would not result in illegal conduct. *The problem is not so simple as that.*" (A. 209)

[38]See editorials in the Wall Street Journal, May 25, 1967 and July 6, 1967.

The Board's concluded findings fail to indicate in any way the evidence upon which they are allegedly based, other than the "totality" doctrine. The Board did *not* find that Petitioner had made any threat of reprisal to its employees. Still, its order forbids Petitioner from:

> "*Threatening* the employees with *possible* closing of the plant . . . or with any other economic reprisals. . . ." (A. 199)

Regardless of the merits of the "totality" doctrine, and even if the doctrine may be accorded limited acceptance in some circumstances, the Board's order must still be supported by evidence and by reasoned and specific findings. This is especially so when constitutionally protected liberties are involved. And, in such cases, the Board's order must be precise and specific, not broad, vague and ambiguous. We will now turn to the constitutional and statutory standards which must be applied when an order curtails free expression.

B. The Board's Order Does Not Comply With Constitutional Standards With Respect to an Order Restricting Freedom of Speech.

The "totality" doctrine, as applied here by the Board, amounts to almost a complete prohibition of speech by Petitioner. The Board's order is supported by no specific findings regarding those statements within the "totality" which resulted in its finding of illegality. Assuredly, the Board, by the mere "label" of "totality", cannot be allowed to restrain a most fundamental and precious liberty. A clear example of arbitrary exercise of administrative power is presented. Surely the constitutional right of free expression would have little value if it could be curtailed by the mere labeling of speech as unlawful as a "totality" without adequate findings to support the ultimate finding of illegality. This court on numerous occasions has protected speech which was restrained by characterizing it with a label though sufficient to sustain proscription. In *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), this Court held that constitu-

tional rights could not be foreclosed "by mere labels" (371 U.S. at 429) and that characterizing the activities of the petitioner there as "solicitation" could not serve to justify a restraint.[39]

But the vice of the "totality" doctrine, as applied by the Board, is not only the fact that on this record it is a mere label. The Board's order, unsupported as it is by precise findings, seeks to prohibit a wide range of speech and leaves Petitioner to act at its peril in exercising a fundamental liberty. The Board ordered Petitioner to cease and desist from "*threatening* the employees with the possible closing of the plant . . . or with any other economic reprisals, if they were to *select* the" Teamsters as their bargaining agent (A. 199). This order is completely devoid of factual findings to support it other than the "totality" label and in no way defines the line between speech which will hereafter be permitted and that which is proscribed.

In *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), this Court stated:

> "If the line drawn by the decree *between the permitted and prohibited activities* . . . is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness *are strict in the area of free expression.*" (371 U.S. at 432)

This Court held that the decree entered there might be invalid if it prohibited the exercise of First Amendment rights whether or not the Petitioner there had engaged in priveleged conduct. This Court emphasized the danger of

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[39] See also *Herndon v. Lowry*, 301 U.S. 242 (1937), insurrection; *Bridges v. California*, 314 U.S. 252 (1941), contempt; *DeJonge v. Oregon*, 299 U.S. 353 (1937), advocacy of unlawful acts; *Edwards v. South Carolina*, 372 U.S. 229 (1963), breach of the peace; *Roth v. United States*, 354 U.S. 471 (1957), obscenity; and *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), libel.

tolerating a statute susceptible to improper application to First Amendment freedoms:

> "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The *threat of sanctions may deter their exercise* almost as potently as the actual application of sanctions . . . Because First Amendment freedoms need breathing space to survive, *government may regulate in the area only with narrow specificity.*" (371 U.S. at 433)
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> ". . . Broad prophylactic rules in the area of free expression are suspect. . . . *Precision of regulation must be the touchstone* in an area so closely touching our most precious freedoms." (371 U.S. at 438)

Here, the findings with respect to "totality" are broad, ambiguous, non-specific, vague and unprecise. No line was drawn by the Board between activites which were permitted and those which were being proscribed.

In *Wood v. Georgia*, 370 U.S. 375 (1962), this Court emphasized that the record was barren of findings which showed "*how* the publications interfered with the grand jury's investigation, or with the administration of justice." (370 U.S. at 387). The same is true here. There are no findings to show that Petitioner's statements constituted threats of reprisal by Petitioner nor are there any findings to show *how* the "totality" of Petitioner's statements constituted violations of Section 8(a)(1) of the Act and particularly, *how* such statements supported the Board's order to Petitioner to cease and desist from:

> "Threatening the employees with the possible closing of the plant . . . if they were *to select* the" (Teamsters) (A. 199).

We now turn to the opinion of the Court below wherein that Court *failed* to apply *constitutional standards* and *enforced* the Board's order upon the ground that it was supported by *substantial evidence.*

C. The Statutory Standard of Substantial Evidence To Support a Board Order Cannot Be Lawfully Applied To Restrict the Exercise of Constitutional Freedoms.

Petitioner's "letters, pamphlets (and) leaflets" (A. 183) were in writing, and the Board's findings with respect to speeches were based entirely upon the testimony of President Sinclair and Respondent's Exhibit No. 20 (A. 182).[40] Under such circumstances, the standard of substantiality of the evidence as to the "words" used is not involved. The Court below stated:

> "The basic question is whether on the record as a whole these findings are supported by substantial evidence" (A. 205).

Although the Board's findings involved only "interpretation" of Petitioner's statements, it also involved an order restraining speech. The Court of Appeals failed to make the required independent review of the entire record to determine whether the Board's order constituted an invasion of constitutional freedoms. In this the Court of Appeals erred.

To the extent that the "substantial evidence" standard of Section 10(e) of the Act establishes a presumption of the validity of the Board's findings and conclusions, it cannot stand, at least insofar as the Board's order may trench upon constitutionally guaranteed freedoms. On many occasions this Court has held that presumptions of validity regarding the exercise of governmental power cannot constitute a means to deter speech which the Constitution makes free. In *Wood v. Georgia*, 370 U.S. 375 (1962), this Court held, with respect to freedom of speech:

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[40] President Sinclair was found to be a "forthright and candid witness" (A. 171), and his testimony was not discredited in any respect by the Trial Examiner. The Trial Examiner, did, however, discredit the testimony of Messrs. Brunault (A. 171) and Bougie (A. 174), who were members of the Teamsters Organizing Committee (A. 110-112, 117).

> ". . . When it is claimed that such liberties have been abridged, we cannot allow a presumption of validity of the exercise of state power to interfere with our close examination of the substantive claim." (370 U.S. at 386)

Similarly, in *Speiser v. Randall*, 357 U.S. 513 (1958), the Court pointed out the danger that legitimate utterances would be penalized by the generality of standards applied. This Court held that deterrence of speech, which the Constitution makes free cannot be accomplished:

> ". . . indirectly by the creation of a statutory presumption any more than . . . by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions" (357 U.S. at 526).

This Court has long held that in any cases involving the definition of the ultimate limits of governmental power to restrict freedom of speech that this Court would:

> "examine 'the evidence to see whether it furnishes a rational basis for the characterizations put on it'. . ." (370 U.S. at 386)

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court stated:

> "We must make an independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expresson." (376 U.S. at 285)[41]

In short, when free speech is involved, a characterization must be shown to be supported by adequate, precise findings; and the standard of "substantial evidence" cannot foreclose a close examination of the evidence to make certain, in both circumstances, that the judgment does not abridge constitutional freedoms. Many of the Courts of Appeal have correctly applied these principles.

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[41] See also, *Cox v. Louisiana*, 379 U.S. 536, 544 (1964), Footnote 8, and *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

In *NLRB v. Golub Corporation*, 388 F.2d 921 (CA-1, 1967), the Court of Appeals overturned the findings of the Board with respect to the Employer's communications. As here, the Board's findings with respect to Section 8(a)(1) of the Act, consisted solely of writings and a speech addressed to the employees as a group . . . (and) sharply raises the issue how far the Board may go in curbing speech consistently with §8 (c) and the First Amendment" (388 F2d at 924). The Court stated:

> "Whatever vitality decisions . . . giving weight to an agency's construction of statutory language may have generally . . . such considerations have little weight when the statute being enforced approaches the limits of constitutional power. In such a case we encounter the overriding principle of construction requiring that statutes be read so as to avoid serious constitutional doubt, for which it here sufficies to cite *Int'. Ass'n of Machinists v. Streit*, 367 U.S. 740, 749-50 (1961)." (388 F.2d at 928)[42]

The Court of Appeals for the Sixth Circuit in *NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (CA-6, 1967), refused to accept the Board's construction of a writing and stated:

> ". . . Our holding simply is that the Board's construction of a writing is not sacrosanct and that we have the right, if not the duty, to correct an impermissible and unfounded inference drawn therefrom" (372 F.2d at 206).[43]

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[42] Judge Hays dissented contending that such questions should be left to Board "expertise" (388 F.2d at 930).

[43] And see also *NLRB v. Rockwell Manufacturing Company*, 271 F.2d 109, 117 (CA-3, 1959), "An analysis of the verbal exchanges referred to . . . negates the Board's determination"; *NLRB v. Wilson Lumber Co.*, 355 F.2d 426, 432 (CA-8, 1966), the Employer's statements "were improperly interpreted by . . . The Board as a basis for authorizing an unfavorable inference"; *NLRB v. TRW, Semiconductors, Inc.*, 385 F.2d 753, 760 (CA-9, 1967), "Read as a whole, the statement cannot, we think, be fairly construed as a threat by the employer"; *NLRB v. Laars Engineers, Inc.*, 332 F.2d 664, 667 (CA-9, 1964), "The letter as a whole does not justify the narrow and strained

We next consider whether the Board's "expertise" constitutes an adequate ground for its order herein.

D. Regardless of Its Applicability in Other Contexts, the Board's So-Called "Expertise" Cannot Serve as the Basis for Restricting Constitutional Freedoms, Particularly When the Board Fails To Set Forth Precise, Relevant and Reasoned Findings To Support Its Order.

The instant case is a startling example of the "monster" of expertise" turned loose to rule "with no practical limits on its discretion". *Burlington Truck Lines v. United States Lines*, 371 U.S. 156, at 167 (1962).[44] In *Burlington* this Court set aside the agency decision because there were "no findings and no analysis . . . to justify the choice made" (371 U.S. at 167). This Court further pointed out that Courts could not substitute either *their own* discretion or that of appellate counsel for that of the agency, and that an agency's order was to be "upheld, if at all, on the same basis articulated in the order by the agency itself" (371 U.S. at 169).[45]

These principles were recently reaffirmed in *The Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, ___

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construction given to it by the Board"; and *NLRB v. Colvert Dairy Products Co.*, 317 F.2d 44, 46, 47 (CA-10, 1963), "The right of agement to freely express its views in opposition to unionization cannot be burdened by indirection and thus destroyed through technical rationalization."

[44]This Court cited the provisions of Section 8(b) of the Administrative Procedure Act (5 U.S.C. § 557(c), then § 1007(b)), which provides in relevant part: "The record shall show the ruling on each finding, conclusion or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions *and the reasons or basis therefor*, on all the material issues of fact, law or discretion presented in the record . . ."

[45]"The Courts may not accept appellate counsel's post hoc rationalizations for agency action." (371 U.S. at 168)

U.S.___, 21 L.Ed. 2d 219 (1968). There the District Court set aside an order of the Interstate Commerce Commission with respect to the division of joint rates because "precise and relevant findings", supported by substantial evidence, were lacking. This Court stated that to affirm the Commission's finding, "would, in effect, be saying that the expertise of the Commission is so great that when it *says* . . . (something) the controversy is at an end" (21 L.Ed. 2d at 224). This Court further stated:

> "The requirement for administrative decisions based on substantial evidence *and reasoned findings—which alone make judicial review possible*—would become lost in the *haze of so-called expertise* . . . That is impermissible under the Administrative Procedure Act." (21 L. Ed. 2d at 224)[46]

The vice in the instant case is readily apparent. The Board referred to and attempted to characterize carefully chosen excerpts from Petitioner's admitted communications, which were taken out of context (A. 172-183). However, no specific, reasoned findings were made by the Board to support its Order requiring Petitioner to cease and desist from threatening its employees.

The Board's Order proscribes *threats* by Petitioner of "possible closing of the plant" (A. 199). The Board's Concluded Findings, however, fail to support that order. The Board found that the "totality" of Petitioner's expressions from *July through December 8:*

> ". . . reasonably *tended* to convey to the employees the *belief* or *impression* that *selection of the Union* . . . could lead Respondent to close its plant . . ." (A. 183)[47]

[46]Compare *Wood v. Georgia*, 370 U.S. 375 (1962), where this Court stated, in part: "The court did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice" (370 U.S. at 387, emphasis in original).

[47]The Board apparently considers that a "tendency" to convey a thought is the legal equivalent of having conveyed it. In other words, a "tendency" to convey a threat is equivalent to having made the threat.

This same finding is made "based only on the 'totality'" of the communications which occurred between *November 8 and December 9* (A. 183). In neither case did the Board specify, other than its reference to "totality", the specific expressions which *tended* to engender this belief or impression. We are left, therefore, with findings which are meaningless and virtually unreviewable. We have searched the excerpts quoted by the Board (A. 172-182) in vain for any statement by Petitioner that "selection of the Union . . . could lead Respondent to close its plant". There is no such statement! The Concluded Finding to that effect must, therefore, be based solely upon Board "expertise" in considering the "totality". We have not yet been shown the evidence, if any there be, that allegedly supports such Concluded Finding.

Obviously, recognizing the weakness of its initial concluded finding in this regard, which related only to the "possibility" of a plant closure if the Union was selected, the Board attempted to buttress that Concluded Finding. It did so by another Concluded Finding that Petitioner's communications, even after November 8:

> ". . . reasonably *tended* to convey to employees (the message that if they *selected* this Union . . . a strike would be inevitable because *the Union* would *make excessive demands* which (Petitioner) would refuse to meet (and) that *a strike could* lead to the closing of the plant. . ." (A. 184)[48]

The above finding is in direct conflict with the initial finding. No longer will the plant be closed because of a "selection of the Union." However, the plant might be closed if *the Union* (not Petitioner) makes excessive demands which Petitioner rejects *and* if *the Union* (not Petitioner) calls a strike to enforce such unreasonable demands.

In its *second* Concluded Finding, therefore, the Board *absolved Petitioner of any threat* to close its plant *because*

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[48]The Board nowhere indicates the specific evidence that supports either of the Concluded Findings.

of "selection of the Union." However, it nevertheless ordered Petitioner to cease and desist from

> "Threatening the employees with the possible closing of the plant . . . *if they* were *to select* the" (Teamsters) (A. 199).

Surely, here, "expertise" has truly run amuck!

The Court of Appeals, however, floundered in the mire of "totality", "expertise" and "substantial evidence." It erred in attempting to substitute its own discretion for that of the Board. Although it upheld the Board's order, it did not do so "on the same basis articulated *in the order* by the agency itself" (371 U.S. at 169). The Court of Appeals cited only some of the communications recited by the Board. It stated that the Board's order was "based on findings that the company interfered with the organizational rights of its employees by threatening that unionization *would* cause them to lose their jobs" (A. 205). *The Board made no such finding!*[49] The Court incorrectly stated that the Board's findings were based only on Petitioner's communications between November 8 and December 9 (A. 207).

Unable to determine the basis for the Board's order, the Court of Appeals made *four (4) findings* of its own in which it attempted to set forth grounds to justify the Board's order (A. 210). The first two (2) such findings by the Court related to Petitioner's statements that it was in financial difficulty and that the Teamsters were "strike happy." There is no indication that the Board relied upon either of these grounds and, in any event, they do not support the Board's order.

The Court's third (3rd) and fourth (4th) findings, that another strike could, and in President Sinclair's opinion,[50]

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[49] The Court below made no reference to the Board's *second* Concluded Finding which absolved Petitioner of having made such a threat.

[50] An *opinion* that the Teamsters *would* cause a long strike as in 1952 to enforce unreasonable demands and would bankrupt Petitioner cannot be characterized as a threat of reprisal *by Petitioner.*

would close the plant and that it would be difficult for weavers to obtain other jobs, relate to the Board's *second* Concluded Finding under which Petitioner was absolved of the threat set forth in the Board's order. The Court's finding is not supported by the evidence or even by the Board's second Concluded Finding, which relates to "excessive demands" (A. 184) and a strike to enforce such excessive demands. Even the Board did not charge that Petitioner contended that such a strike "*would*" close the plant (A. 183, 184).

After substituting its discretion for that of the Board and after making its own inaccurate findings which, in any event, do not support the Board's order, the Court of Appeals deferred to the Board's "expertise"[51] and to the standard of "substantial evidence" and enforced the Board's order not only with respect to the alleged violation of Section 8(a)(1) of the Act, but also with respect to the objections to the election (A. 210, 211).

The Court below also held that Petitioner had "made threats of economic consequences to its business in case of unionization" and that, therefore, Petitioner had the "burden of proving justification" which is had not met (A. 211). We submit that this holding does not comply with constitutional requirements and it was *not a basis for the order which was articulated by the Board.*

We refer first to the rule, cited above, that the evidence must be constitutionally sufficient to support the order. Second, the burden of proof was upon the Board's General Counsel to establish a violation of the Act. Third, this Court has frequently held that such a burden cannot, consistently with constitutional guarantees, be placed upon a speaker. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court stated:

[51] Compare *NLRB v. Hobart Bros. Co.*, 372 F.2d 203, 206 (CA-6, 1967), where the Court stated: "Further, the construction of a writing is *not* the special expertis of the Board. Rather, it is for the Courts which have more experience and competence in construing and interpreting written instruments . . ."

> "Authoritative interpretation of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, *or administrative officials* —and *especially one that puts the burden of proving truth on the speaker*. . . . The Constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and belief which are offered'." (376 U.S. at 271).

This Court further stated:

> "That erroneous statement is inevitable in free debate, *and that it must be protected* if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . " (376 U.S. at 271, 272).

With respect to the burden of proof, in *Speiser v. Randall*, 357 U.S. 513 (1958), this Court discussed at length the dangers inherent to speech by placing the burden of proof upon the speaker:

> "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct *necessarily* must steer far wider of the unlawful zone. . . It can only result in a deterrence of speech which the Constitution makes free." (357 U.S. at 526).

We, therefore, submit that the Board's order here should not have been enforced on the basis of the Board's expertise nor should it have been enforced by the Court below upon grounds determined by it but not articulated in the Board's order. We now turn to a consideration of statements made in Petitioner's communications.

E. Petitioner's Statements Were Factual and Relevant to the Issues. The Board Made No Findings To Show How Such Statements Were Converted into an Alleged Threat and Thereby Lost Their Protection Under Section 8(c) of the Act And the First Amendment, Especially in View of Petitioner's Statements of Good Faith.

We herein discuss the various subject matters included in Petitioner's communications, to show that none of such statements support the Board's Order.

(1) Statements With Respect to Petitioner's Financial Condition Were Privileged.

A large portion of Petitioner's communications were devoted to a discussion of its financial condition dating back to 1952. This included statements that Petitioner almost went bankrupt in 1952 as a result of that strike; that it never recovered from the strike; that it had been and still was on "thin ice" financially; and that as a result, President Sinclair had been compelled to sell the family-owned business.[52] The Board never explained how these truthful statements contributed to an allegedly unlawful "totality" of speech.

(2) Statements With Regard to the 1952 Strike

On a number of occasions President Sinclair referred to the twelve or thirteen week strike which occurred in 1952 and to the termination of that strike without the execution of a new collective bargaining agreement. The Board did not even attempt to show that any of these statements were not factual. Notwithstanding this Court's ruling in

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[52]One of the Board's specific findings was that President Sinclair admitted having "made a *small* profit in 1965" (A. 184). Petitioner being on a calendar year basis (A. 69) could not have known this *until 1966.* What effect this finding had with respect to the "totality" was never explained by the Board.

Thornhill v. Alabama, 310 U.S. 88 (1940), that the dissemination of information concerning the facts of a labor dispute could not lawfully be enjoined, the Board included findings concerning the above statements as part of the unlawful "totality" and as a basis for its order herein.

(3) Statements Regarding the New Association With Lindsay

Petitioner's statements with respect to Lindsay included the *facts* that Lindsay had other plants; that, because of this fact, Lindsay would not be affected by a strike in the same way as Petitioner was in 1952; that Lindsay would not be concerned with a strike threat or a strike; and that Lindsay insisted that Petitioner must stand on its own feet and must earn its own way. The Board did not even attempt to show that these statements were not factual. Such statements certainly were relevant to the question "as to whether the Union will be able to represent (the employees) effectively in light of existing economic conditions" (A. 189). There is no explanation in the record how such statements, in view of the First Amendment and Section 8(c), could be considered unlawful either in themselves or to contribute to an unlawful "totality."

(4) Comments Regarding Unreasonable Demands

Petitioner's communications frequently referred to the Teamsters' "big" promises and to unreasonable demands that it expected would be made upon it. Petitioner's characterization of the Teamsters' promises, set forth in two (2) letters to employees (G.C. Ex. 3; A. 6, 108; G.C. Ex. 6; A. 8, 110) could not, by any stretch of the imagination, constitute a threat of force or reprisal by petitioner or contribute to an unlawful "totality."[53]

[53] Another specific finding was that "the charging Union in this case, Local No. 404, had never made any demands *at all* upon . . ." Petitioner (A. 184). This finding ignores the Union's demands for recognition and bargaining. If it be construed to relate only to formal contract demands, only the most strained interpretation and ig-

(5) Comments Regarding Teamster Corruption

The propensity of the Board to curtail free expression and to shield employees from information the Board believes they should not have is clearly shown with respect to comments concerning Teamster misconduct. Again, the Board did not even attempt to show that any statement made by Petitioner was not factual. Petitioner's statements were based upon Court decisions, newspaper articles, proceedings of a Senate investigating committee, magazine articles by Senator McClellan and Senator Kennedy's book "The Enemy Within".[54] Although this information is available to the public generally and could not possibly provide the basis for a threat of reprisal by Petitioner, the Board relied extensively upon comments concerning Teamster corruption (A. 173, 176, 177, 178, 180). It is difficult to conceive of a more outright attempt by administrative fiat to prohibit the exercise of constitutionally protected rights of freedom of expression.[55]

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norance of realities (not expertise) could support it. It would take incredible naivete to believe that the 62½¢ package allegedly won by the Teamsters from other employers would not be considered a bargaining goal with Petitioner (G.C. Ex. 3; A. 6, 108).

[54]For example, see *Hoffa v. Gray*, 323 F.2d 178 (CA-6, cert. den., 357 U.S. 907 (1963); *Hoffa v. United States*, 385 U.S. 293 (1966); *Hoffa v. United States*, 387 U.S. 231 (1967); *Hoffa v. United States*, 382 F.2d 856 (CA-6), cert. den., 390 U.S. 924 (1968); *Hoffa v. United States*, 376 F.2d 1020 (CA-6), cert. den., 389 U.S. 859 (1967); and Hearings Before the Select Committee on Improper Activities in the Labor or Management Field, Eighty-Fifth Congress, First Session (1957). See also *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Hoffa*, 242 F. Supp. 246 (U.S.D.C., D.C., 1965), an action to enjoin expenditure of Union funds in defense of criminal proceedings against General President of Union; and *Highway Truckdrivers and Helpers Local 107, I.B.T. v. Cohen*, 284 F.2d 162 (CA-3, 1960), an action to enjoin use of funds of Local by officers to defend civil and criminal proceedings (cert. den., 365 U.S. 833, 1961).

[55]A third specific finding was that Petitioner "has no basis for concluding that this local or its leaders were *in any way connected* with racketeering or hoodlums or picket line violence" (A. 184). Of

(6) Petitioner's References To Strikes To Enforce Unreasonable Demands and the Possible Consequences Thereof

Another category of statements which were included in the "totality" were those dealing with strikes, strikes to enforce unreasonable demands and the possible consequences of such a strike. The Board's findings in this regard require a more detailed analysis than was given by the Board or by the Court below.

There is no record support for the Board's *first* Concluded Finding that *selection* of the Union *could* lead Petitioner to close its plant (A. 183). As shown above, the Board immediately abandoned that finding and substituted its *second* Concluded Finding (A. 184).

All of Petitioner's statements dealt with the impact of *negotiations* with a Union that made *excessive demands*, beyond the financial ability of the companies involved to pay and to a strike then called by the Union *to enforce such demands.*[56]

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course, constitutional protection is not limited only to statements with respect to which the speaker can prove an objective basis. However, the Board's finding was reached only by incredible straining and twisting of evidentiary facts. First, there is *no evidence* that President Sinclair charged Local 404 with corruption; and second, he testified that the Local was "connected with the International" (A. 48, 52, 64). The Regional Director's findings on the *same evidence* should be compared: "The Employer . . . made reference to . . . alleged corruption and misconduct in the . . . (Union's) *International leadership*" (Report on Objections, G.C. Ex. 1(d); A. 4).

[56]Emphasis was placed by the Board and by the Court below upon the phrase "the union's only weapon is a strike" (A. 172, 181, 210). The record shows the following context: that strikes "could be caused by the Company's inability to accede to Union demands (A. 43); and if "a Company cannot economically meet the demands of the Union then the only answer that the Union has is to strike or to accede to a settlement" (A. 51).

In his July talk, President Sinclair stated that he did not want to be in the position where a Union would strike to enforce unreasonable demands which Petitioner could not meet and which would put the Company back in the same situation as in 1952 (A. 36, 90). He further stated that, "this could lead to the closing of the plant" (A. 43), "there was a possibility *through a strike* that the plant would close" (A. 60), but that he "did not intend to close" (A. 43, 172) because "this was my life too" (A. 58).[57]

A reference to plant closing is included in only *one (1)* of Petitioner's written communications, namely, the November 2 letter (G.C. Ex. 14; A. 11, 123). It was pointed out that petitioner might already have been out of business if Lindsay had not purchased it, and that "real job security" depended upon operating the plant at a profit "because no Company can remain in business unless it can make money" (A. 125). Petitioner further stated in this connection:

> "If the Teamsters win the election, the Company has an obligation to bargain . . . in good faith . . . *We will meet this obligation,* but we will not agree to any *increase in costs* which *can* put us out of business.
>
> ". . . We are still on 'thin ice', and it just doesn't *make sense* for us to *meet unreasonable* Union demand which will *result in further losses* and *eventually* the *necessity* of closing the plant" (A. 126).

Petitioner discussed strikes and its connection with Lindsay in its November 30 letter (G. C. Ex. 17, A. 13, 130). It also stated:

> "This Company is *not anti-union.* We would *not close* the plant *in retaliation* for employees *voting for a Union.* But this Company must show a profit,

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[57]These statements were made in the background of the fact that Lindsay had incorporated the Mississippi plant into its own operations, but continued Petitioner's operations as a separate division, with instructions to make a profit. The "or else" in Lindsay's decision not to subsidize Petitioner was plainly apparent.

regardless of whether or not you select the Teamsters Union as your spokesman." (A. 132)

In his December 8 talk, President Sinclair emphasized that the decision was up to the employees alone; that no one could threaten or coerce them (A. 162); that there were a lot more important things than who would represent them (A. 162); that he would do his "level best *to keep* Sinclair Co. *in business and growing;* and "I'm not concerned with beating a union—I'm concerned with our future" (A. 165).

These communications can be summarized as follows: If selected, the Teamsters may make unreasonable demands; the Company is financially unable to grant excessive or unreasonable demands; Lindsay has demanded that we make a profit; if the Union wins the election, we will negotiate in good faith;[58] there will be no reprisals by the Company if the Teamsters are selected; however, if the Teamsters choose the alternative of a strike to enforce the unreasonable demands, as it did in 1952, instead of acceding to a settlement, there is a *possibility* that such a strike could lead to the closing of the plant.[59]

Nothing in this evidence can be characterized as a threat by Petitioner to close its plant if the employees "selected" the Union, as the Board itself recognized when it made its second Concluded Finding (A. 184).

(7) Cartoons Used by Petitioner To Dramatize Its Arguments Were Protected by Section 8(c) and Were Also Constitutionally Protected.

It is impossible to determine what weight, if any, was given by the Board to Petitioner's cartoons in the "totality

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[58] In fulfilling its duty to bargain, Petitioner would have been required to furnish information substantiating its plea of inability to pay. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

[59] The AWWPA, which had insisted on industry-wide contracts and which had struck to enforce unreasonable demands in 1952, was now the "Wire Weavers Trade Division" of the Teamsters (A. 82, 108, 206).

of . . . (Petitioner's) conduct in violation of Section 8(a)(1) of the Act" (A. 204). Obviously, they were not found unlawful in themselves. It remains unexplained on this record in what way they attained an impact of a threat of reprisal by Petitioner, if this is what the Board contends.

It will suffice here to say that the cartoon, "Who Would Buy The Groceries . . ." (A. 143) is the same, identical cartoon that was used in *American Greetings Corporation*, 146 NLRB 1440 (1964), except for a change in names. There the Board found no violation, stating that the "statements and cartoons . . . concerned the qualifications of the . . . (Union) to represent the interests of the employees and could readily be evaluated by employees" (146 NLRB at 1444).

The "graveyard" cartoon (A. 137), the "closed shop worker" and "closedest closed shop in town" cartoons (A. 145) had also been before the Board in *I. F. Manufacturing Co.*, Case No. 8-RC-3374 (January 1, 1959, not reported). The Regional Director's ruling overruling objections as follows, *was affirmed by the Board:*

> "These leaflets contain nothing more than propaganda statements *and cartoons* such as are often resorted to in election campaigns, and which the Board does not undertake to police or censor. They are therefore *privileged pursuant to the provisions of Section 8(c)* of the National Labor Relations Act."

Notwithstanding these prior rulings, the Board included the publication of the cartoons in the "totality" of conduct which it found to be violative of Section 8(a)(1), without reversing such prior rulings.

The Board's "totality" ruling was based upon Section 8 (a)(1) of the Act, and it completely ignored the strictures of the First Amendment and of Section 8(c) of the Act. Its ruling was based upon improper standards and should be denied enforcement for that reason alone. In addition, Petitioner's utterances were improperly characterized by the Board, and there is no evidence or findings to support the

Board's order that Petitioner threatened its employees with reprisals if they "selected" the Teamsters as their bargaining agent.[60]

It is axiomatic that words alone cannot constitute a Section 8(a)(1) violation, if they are entitled to the protection of the First Amendment and Section 8(c) of the Act.

We now discuss the Board's ruling, in which it dismissed the representation petition.

F. The Board's Ruling With Respect to the Objections to the Election Was in Violation of Section 8(c) and the First Amendment.

With respect to the Objections to the election, the Board ruled that its findings that Petitioner violated Section 8(a)(1) also constituted grounds for a finding that Petitioner interfered with a "free and untrammeled choice in the election" (A. 188). Recognizing the weakness of its finding of a violation of Section 8(a)(1), the Board also assumed, *arguendo*, that Petitioner's statements were not violative of that Section. It nevertheless set the election aside because of its alternative finding that Petitioner's communications "generated an atmosphere of fear of economic loss" (A. 189), which foreclosed the possibility of employees exer-

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[60] An experienced Regional Director had the same evidence before him with respect to the period from November 8 through December 8 (Report on Objections, G.C. Ex. 1(d); A. 4). He found the election to have been conducted in accordance with the Board's "laboratory conditions" rule and recommended that the Objections be overruled and the election results certified:

> "There is no evidence, however, that these statements were other than factual in character and such matters certainly were relevant to the election issues before the employees.. The entire 'literature' could, as already pointed out with respect to the Employer's speech delivered the day before the election, clearly be evaluated by the employees as campaign propaganda." (G.C. Ex. 1(d); A. 4)

In this regard, we will have further comments, *infra*, with respect to the Board's finding that it would have been "*impossible*" to conduct a second election.

cising judgment to determine "whether the Union will be able to represent them effectively in light of existing economic conditions" (A. 189). Having made this finding, the Board dismissed the election petition and vacated all proceedings held thereunder (A. 203).[61]

In *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782 (1962), the Board reaffirmed its decision in *General Shoe Corporation*, 77 NLRB 124 (1948), holding that Section 8(c) of the Act had no application to representation cases and overruled all of its decisions to the contrary. The Board stated:

> "The strictures of the First Amendment, to be sure, must be considered in all cases." (137 NLRB at 1787, Footnote 11)

The Board, however, honors the above statement primarily in its breach, as shown by the facts in the instant case. The Board improperly characterized Petitioner's statements as generating "an atmosphere of economic loss" and ignored constitutional strictures.

We submit that Petitioner's statements were protected not only by the First Amendment, but also, by Section 8 (c) of the Act, and could not constitute a basis for setting aside the election. The results of that election should now be certified by the Board.

We turn now to the legislative history of Section 8(c) of the Act.

G. The Legislative History of Section 8(c) of The Act Shows That Congress Intended to Prevent the Board From Restraining Employer Speech in the Circumstances Involved in this Case.

We will not burden this brief with a lengthy dissertation with respect to the legislative history of Section 8(c). Bills were introduced in 1947 both in the House and in the Sen-

[61] Compare the ruling of the Regional Director on the same facts (G.C. Ex. 1(d) A. 4).

ate and both included provisions intended to prevent the Board from curtailing employers in their exercise of rights of free expression. A Conference Committee eventually considered the bills passed by the respective branches of Congress.

In reporting back to the Senate, Senator Taft offered a detailed summary of the differences between the Conference agreement and the Senate bill (2 Leg. Hist. 1535).[62] It is therein stated that Section 8(c), as finally agreed, "conforms substantially" with the House Bill and that the phrase "under all the circumstances" which was included in the Senate bill (2 Leg. Hist. 1540, 1541) was deleted because it:

> ". . . Was ambiguous and might be susceptible of being construed as approving certain Board decisions, which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices." (2 Leg. Hist. 1541)

The Senate conferees had acceded, it was explained, since this "certainly was contrary to the intent of the Senate" (2 Leg. Hist. 1541). With respect to the use of speech as evidence, it was explained that utterances were not to be used by the Board, if they contained no threat or promise of benefit "as either an unfair practice alone or as making some other act which could not otherwise be an unfair labor practice" (2 Leg. Hist. 1541).

This interpretation was supplemented by another analysis which indicated that speech "inocuous in itself" was *not* to be found unlawful by the Board because the "employer has at some time committed an unfair labor practice" (2 Leg. Hist. 1624). And in a further explanation after President Truman's veto, Senator Taft stated:

> "The bill simply provides that views, argument or opinion *shall not be evidence* of an unfair labor

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[62]The Legislative History of The Labor Management Relations Act, 1947, published by the National Labor Relations Board, 1948, in two volumes will be herein referred to as "___ Leg. Hist. ___".

practice unless they contain *in themselves* a threat of coercion or a promise of benefit". (2 Leg. Hist. 1627).

The Board itself interpreted Section 8(c) as requiring the statement *in itself* to include a prohibited threat or promise in its two subsequent annual reports:

> "Employer utterances on employees' organizational activities which *contain* 'threat of reprisal or force or promise of benefit' are unlawful . . ." (Thirteenth Annual Report of the National Labor Relations Board, 1948, pp. 49, 50).
>
> "On the other hand, expressions of opinion which *contain no* such threats or promises have been held protected by section 8(c), even though they may be strongly anti-union" (Fourteenth Annual Report of the National Labor Relations Board, 1949, p. 54).

We submit that Congress intended to protect expressions, such as those here involved, which in themselves contain no threat by Petitioner of force or reprisal or promise of benefit. We now consider this Court's decisions with respect to Section 8(c) of the Act.

H. This Court Has Established a Wide Scope for Free Expression Under Section 8(c) of the Act.

This Court has had limited occasion in the past to consider Section 8(c) of the Act. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), involved the bestowal by the Employer of economic benefits prior to a representation election. In a letter to employees before the election, the employer stated, "The Union can't put any of those . . . (benefits) in your envelope—*only the Company can do that*". This Court quoted the provisons of Section 8(c) of the Act in Footnote 3 and stated:

> "We place no reliance, however, on these or other words of the respondent dissociated from its conduct" (375 U.S. at 410).

More recently, however, in *Linn v. United Plant Guard Workers of America,* 383 U.S. 53 (1966), this Court again had occasion to comment upon Section 8(c) of the Act. There the plaintiff sought damages for alleged defamation by the Union occurring during the course of a union organizational campaign. This Court stated:

> "We acknowledge that the enactment of Section 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered 'against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" (383 U.S. at 62)

In the same case, supra, this Court also stated:

> "Labor disputes are ordinarily heated affairs . . . Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often *speak bluntly* and recklessly, embellishing their respective positions with imprecatory language." (383 U.S. at 58)

Petitioner's speech here, while it may have been vehement and caustic and may have included sharp attacks upon the Teamsters, was well within the privilege set forth in Section 8(c).

We now turn to decisions of this Court with respect to the Constitutional protection accorded to speech.

I. Controlling Decisions of this Court Establish that Petitioner's Communications Were Protected by the First Amendment.

This Court, as the tribunal with the ultimate responsibility for protecting and defining the limits and extent of freedom

of speech and expression, has time and again stricken down attempts to limit or encroach upon such constitutional rights.

In the context of labor relations this Court stated in *Thornhill v. Alabama*, 310 U.S. 88 (1940)

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." (310 U.S. at 102)

In *American Federation of Labor v. Swing*, 312 U.S. 321 (1940), this Court held that effort to make known one side of a labor controversy by peaceful means could not be enjoined. In *Thomas v. Collins*, 323 U.S. 516 (1944), this Court stated:

> "The right thus to discuss, and inform people concerning, the advantages *and disadvantages* of unions and joining them is protected not only as part of free speech, but as part of free assembly." (323 U.S. at 532)

Thomas v. Collins, supra, involved a speech given, as here, in connection with a Union organizing drive and an impending NLRB election. This Court referred to its decision in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941) stating:

> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty." (323 U.S. at 537)

In other contexts this Court has unfailingly protected the right of free expression. In *Edwards v. South Carolina*, 372 U.S. 229 (1963), this Court stated:

> "The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. '(A) function of free speech under our system of government is to invite dispute. It may indeed best serve its purpose *when it induces a condition of unrest, creates dissatisfaction with*

> *conditions as they are, or even stirs people to anger.* Speech is often provocative and challenging'." (372 U.S. at 237)

This Court's decision in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), is relevant. There this Court stated, in answer to the contention that the State was regulating "solicitation" by attorneys:

> ". . . discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, *certainly of lawful ends*, against governmental intrusion." (371 U.S. at 429)

Petitioner's communications here were protected not only by Section 8(c), but also by the First Amendment. The Board's finding, therefore, that such communications not only violated Section 8(a)(1) of the Act, but also constituted evidence of a violation of Section 8(a)(5) of the Act and were grounds for setting aside the results of the election of December 9, were contrary to law. In this respect, the Board's Order is without legal foundation and should be set aside.

II.

The Board's Order Requiring Petitioner to Bargain with the Union Is Unsupported in Fact and in Law and Should Not Have Been Enforced by the Court Below.

A. Introduction[63]

The Court below accepted the Board's *ipse dixit* pronouncements on this branch of the case without any ana-

[63]This section of Petitioner's brief need not be considered by the Court if Petitioner's position with respect to its communications is sustained by this Court. The Board's bargaining order is based entirely upon its finding that Section 8(a)(1) of the Act was violated. In the event this Court finds that such communications were protected by the Constitution and Section 8(c), the Board's finding of a Section 8(a)(5) violation would also fall, together with its ruling with respect to the election.

lysis thereof in its opinion. In doing so it approved the conduct of the Board in using Petitoner's communications as evidence supporting at least five (5) different findings which are widely divergent with respect to the time of their occurence and their effect. The Board's finding of violation of Section 8(a)(1) was also used by the Board, by a "bootstrapping" technique, as follows:

(1) To prove a *past* state of mind, namely, that Petitioner did not have a good faith doubt regarding the Union's majority status on September 20; and,

(2) To prove a *past* state of mind, namely that the Petitioner did not have a good faith doubt as to the appropriateness of the unit of journeymen and apprentices which the Union had requested; and,

(3) To prove another *past* state of mind, namely, that on September 20 and thereafter Petitioner desired to gain time in which to dissipate the Union's majority; and

(4) To prove that *concurrently* with their issuance Petitioner's communications caused the Union to lose support among the employees; and

(5) To prove that *in the future* it would be *impossible* to hold a fair election.

It was through the above technique that the Board justified its reliance upon authorization cards and its issuance of a bargaining order against Petitioner. In none of the instances mentioned above did the Board engage in any analysis of the evidence or make any findings to show that its *conclusions* in that regard were supported by the record. On the contrary, the Board studiously ignored substantial evidence on the record which showed the invalidity of each of the above conclusions, as we will hereinafter show. The discussion *supra*, p. 52, with respect to the Board's "expertise" is applicable here. With regard to the bargaining order issued by the Board we will first show that the method preferred by Congress was a secret ballot election.

B. In Resolving Questions of Representation, Congress Adopted the Method of Secret Ballot Elections and Deleted From the Statute Provisions Which Permitted Other Procedures.

The leading decision by the Courts below with respect to this question is *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562 (CA-4, 1967). The Court of Appeals for the Fourth Circuit rejected the procedure followed by the Board here. The Court pointed out that "card checks" or "card counts" were utilized by the Board under the Wagner Act, but that the Taft-Hartley Amendments of 1947 "provide for a secret election under Board supervision as the *exclusive method* of resolving a question of representation" (386 F.2d at 569). It held that a bargaining order remedy might be permissible in exceptional cases where the employer's conduct was particularly outrageous and pervasive, but found no such conduct in the case before it.

The Court set forth the legislative history which supported its decision. We will not delve extensively into that history. Section 9(c) of the Wagner Act (49 Stat. 453) provided that the Board "may" investigate whenever "a question affecting commerce arises concerning the representation of employees." It further provided:

> "In any such investigation, the Board shall provide for an appropriate hearing upon due notice, *either in conjunction with a proceeding under Section 10* or otherwise, and *may* take a secret ballot of employees *or utilize any other suitable method* to ascertain such representatives." (49 Stat. 453)

House Report No. 245[64] sets forth Congress' recognition of the problem that is now before the Court. Comment was made that the American workingman had "been forced into

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[64] House Report No. 245, 80th Congress, 1st Session on H.R. 3020, submitted by Mr. Hartley from the Committee on Education and Labor (1 Leg. Hist. 292-406).

labor organizations against his will" (1 Leg. Hist. 295) and that:

> "The bill prescribes rules *for the new Board to follow* in setting up units for collective bargaining *and in holding elections* to determine whether or not employees wish labor unions to bargain for them. These rules *do away* with practices of the old Board *by which it has subjected* literally millions of workers to control by labor unions *notwithstanding* that the employees did not wish the unions to represent them *and voted against the unions in the Board's elections.*" (1 Leg. Hist. 298)

The House had so little faith in the validity of authorization cards that the Bill passed by the House would have prohibited a run-off election unless the Union seeking a run-off presented authorization cards from "more than 50 per centum of the employees in the bargaining unit in question" (1 Leg. Hist. 189, 190). That the terms "designate" and "select," as retained in Section 9(a) had no particular significance and were not used as words of art is shown by other provisions of the Bill. Section 9(f)(5) of the House Bill used the phrase "in all elections held to *select* representatives . . ." (1 Leg. Hist. 189), but Section 204(b) provided for a "secret ballot" on the employer's last offer *and* "what person or persons, if any, they desire to *designate* as their representative. . . ." (1 Leg. Hist. 216).

Senate Report No. 105[65] stated that the Bill "*requires* the Board to enlarge the rights to petition in representation cases," in the interest of "assuring complete freedom of choice to employees who do *not* wish to be represented collectively" . . . " (1 Leg. Hist. 409). Section 8(b)(4)(B) of the Senate Bill prohibited strikes or boycotts to force another employer to recognize or bargain with a Union that "has *not* been *certified*", thus denying such protection to a

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[65] Senate Report No. 105, 80th Congress, 1st Session on S. 1126 submitted by Mr. Taft from the Committee on Labor and Public Welfare (1 Leg. Hist. 407-504).

"recognized" union. It also proscribed strikes or boycotts for the purpose of forçing an employer to disregard his obligation to bargain with a *certified* ùnion (1 Leg. Hist. 428).

The minority views of Senators Thomas, Murray and Pepper (1 Leg. Hist. 463-504) made no objection to this emphasis on certification. There was an objection, however, to the elimination of the provision with respect to card checks (1 Leg. Hist. 496). The debates also show that it was understood that elections would be the only means for a Union to obtain representative status. Senator Murray proposed a substitute bill but stated during the discussion of such substitute:

> "We also concur in so much of the proposed amendment contained in Section 9(c)(1) which would permit employers to request *certification* of bargaining representatives *whenever an unrecognized* union claims the *right to represent employees* . . . " (2 Leg. Hist. 1439, 1452, 1453).

Senator Murray, however, objected to allowing "the employer to challenge the representation of *certified* unions at any time" arguing that this would impair stability. With respect to "*recertification* of organizations already certified", the substitute would have left that to the rules of the Board "provided that there is *a bona fide doubt* as to representation and the request is made at least 30 days before the contract expires" (2 Leg. Hist. 1453).[66]

It is apparent that there was no misunderstanding that certification through a Board election would be the only procedure to be followed when an unrecognized union claimed that it represented employees. The employer was to have a right to an election even if the Union struck for recognition.[67]

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[66]No requirement of having doubt, *bona fide* or otherwise, was suggested except where the Union had already been certified.

[67]"But where only one union is in the picture, the Board denies him this right (to have an election). Consequently, even though a union which has the right to petition and be certified as the major-

Congress not only deleted from Section 9(c) the Board's former authority to *"utilize any other suitable method"*, other than an election, to ascertain the representative, it also withdrew the Board's authority to conduct an investigation with regard to a question of representation:

> "either in conjunction with a proceeding under Section 10 or otherwise."

Notwithstanding rescission of its authority to conduct card checks and to determine a representative in proceedings under Section 10 of the Act, the Board continues to exercise that authority and continues to conduct card checks upon the theory, which is nowhere expressed in the Act, that an employer must show a good faith doubt regarding the Union's representative status before it may refuse to bargain with an unrecognized and uncertified Union.

C. The Board Attempts to Give Ultimate Binding Effect To Authorization Cards Even Though The Board And Many Courts Have Found Them To Be Notoriously Unreliable. A Mere Check Of Authorization Cards Does Not Establish That They Were Freely Executed And A Certification Proceeding, Not An Investigation By An Employer, Was Intended By Congress As The Method For Resolving Such Questions.

The Board itself characterized authorization cards as "a notoriously unreliable method of determining majority status of a union". *Sunbeam Corporation*, 99 NLRB 546

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ity representative, if it is really such, *may strike for recognition*, an employer has no recourse to the Board for settlement of such disputes by the peaceful procedures provided for by the Act" (1 Leg. Hist. 417). However, the primary strike for recognition was not made unlawful (1 Leg. Hist. 428). The Board now considers evidence of a strike for recognition as evidence of lack of good faith doubt requiring a bargaining order. *World Carpets of N.Y., Inc.*, 163 NLRB No. 74 (1967); *Independent, Inc.*, 165 NLRB No. 53 (1967); *Maxville Stone Co.*, 166 NLRB No. 105 (1967); and *Holland Custard & Ice Cream, Inc.*, 158 NLRB No. 116 (1966).

(1952) at 550. The characterization of cards as "notoriously unreliable" has been adopted by several Courts of Appeal. *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562, 565 (C.A. 4, 1967); *NLRB v. River Togs, Inc.*, 382 F.2d 198, 206 (C.A. 2, 1967); *NLRB v. Fashion Fair, Inc.*, 399, F.2d 764, 768 (C.A. 6, 1968).

Also, as stated by the Court of Appeals for the Second Circuit in *NLRB v. River Togs, Inc.*, 382 F.2d 198 (C.A. 2, 1962):

> "Some indication of the degree of unreliability is afforded by the statistics in Chairman McCullochs' oft-cited address, A Tale of Two Cities: or Law In Action, printed in Proceedings, Section of Labor Relations Law, American Bar Ass'n, pp. 14, 17-18 (1962)." (382 F.2d at 206)

The "notoriously unreliable" nature of signed Authorization cards is graphically illustrated by the Board's own monthly Election Reports.[68] For the purpose of this portion of our brief, we have examined the monthly NLRB Election Report for cases closed during January, 1968 through October, 1968 (the latest issued as of the date of the preparation of this brief).

In order to emphasize the point here made by the Petitioner, we have checked the figures as to:

(1) Cases in which the Teamsters Union was the only union on the ballot (i.e., a "Yes" or "No" choice);

(2) Where the voting unit was in the range of 10 through 19 employees;[69]

We have *excluded* so-called RM or RD cases (in which either the employees or the Employer filed a petition to "decertify" the Teamsters as the incumbent union).

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[68] Issued monthly by its Division of Administration under "(ER __)".

[69] Code 2 in the NLRB Election Reports through June, 1968; thereafter uncoded, but identifiable by the number shown as being in the voting unit.

This analysis, therefore, equates the situations analyzed to that here present, to wit, a situation under which

(a) A unit of 10 to 19 employees is involved;

(b) A "Yes" or "No" single-union ballot was presented;

(c) The Teamsters Union filed the petition and was required, by NLRB Rules, to support the petition by a showing of signed Authorization Cards *from a MINIMUM of 30% of the employees in the unit.*[70]

Note the results:

	Total Elections	Percentage of "Yes" Votes (i.e., *for* the Union)[71]					
		NONE	1% through 10%	11% through 20%	21% through 29%	30% through 40%	41% through 50%
January	13	1	0	0	2	3	7
February	15	1	0	5	2	4	3
March	17	2	0	3	3	2	7
April	23	0	1	2	6	6	8
May	18	1	0	1	2	4	10
June	19	1	0	1	2	8	7
July	24	1	1	3	8	6	5
August	19	2	0	2	1	6	8
September	23	3	0	4	5	6	5
October	22	2	0	2	3	10	5
	190	14	2	23	34	55	65

Thus, in 190 elections in units of 10 to 19 employees for which the Teamsters Union petitioned during the 10-month period, it secured *less than 30% votes* in 73 (39.5%) of the elections, and in 14 of those elections (7.3%), *it did not secure a single vote.*[72]

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[70] See Statements of Procedure, Series 8, as Amended–Part 101, Sec. 101.18.

[71] Percentage figures to the closest full percent.

[72] Even though the NLRB Rules (See Sec. 102.69 of NLRB Rules & Regulations) permit, and the Union undoubtedly had, an employee observer at the polling place.

It is apparent that in over 39% of such elections, the authorization cards did not reflect the true desires of the employees involved. Undoubtedly, the percentage is much higher, but it cannot be demonstrated by statistical analysis, inasmuch as the Board does not report the number of authorization cards which were filed to support the petition. While speculation by scholars, law students and social scientists may have its place, it cannot overcome the telling effect of the Board's own records!

We submit that it is clear that authorization cards, collected as they are in the heat of organizing campaigns, with the use of subtle social pressures and at times even overt threats, have nothing to commend them. We will not here repeat the comparison made by the Fourth Circuit in *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562 (CA-4, 1967), between the "laboratory conditions" which the Board imposes with respect to a secret ballot election and the complete unreliability of a mere check of cards against an employer's payroll (386 F.2d at 565).[73]

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[73]The Board's decisions show the tactics and misrepresentations used to obtain signatures: *I.T.T. Semi Conductors*, 165 NLRB No. 98 (1967), employees told that a majority had already signed; *Sperti Sunlamp Div.*, 162 NLRB No. 109 (1967), threats; *Pembek Oil*, 165 NLRB No. 51 (1967), that cards would authorize Union to talk to employer; *Yazoo Valley Electric Power Assn.*, 163 NLRB No. 106 (1967), employees told purpose of cards was to get an election; *Hercules Packing Corp.*, 163 NLRB No. 35 (1967), employees told cards were needed to obtain election; *Atlas Engine Works*, 163 NLRB No. 61 (1967), employees told election would be held if enough cards were signed; *General Steel Products*, 157 NLRB No. 59 (1966), employees told cards would be kept secret; *S.E. Nichols Co.*, 156 NLRB No. 106 (1966), employees told they would have opportunity to vote; *John Kinkel & Sons*, 157 NLRB No. 64 (1966), employer told "everybody" in plant had already signed cards; *Cedar Hills Theaters, Inc.*, 168 NLRB No. 116 (1967), employees told they would receive extra work and initiation fee would be waived if they signed; and *R. W., Inc.*, 170 NLRB No. 67 (1968), employees led to believe there would be automatic benefits and that cards would be used for election. Many other similar decisions could be cited.

A mere check of the Teamsters' cards again Petitioner's payroll by an independent third party, as requested by the Union here (A. 115), would have proved exactly nothing. Unless he were a handwriting expert, he could not possibly know whether any of the signatures were forged. A mere check against payroll would not disclose the circumstances under which the cards were signed, whether any threats had been made, what pressures had been exerted or what misrepresentations had been made. All cards would be counted as valid if the signer's name appeared on the payroll list.

It was in the face of this background regarding invalidity of cards, that Petitioner rejected the offered card checks and referred to Chairman McCulloch's talk regarding the unreliability of cards in its rejection letters (G.C. Ex. 7; A. 8, 112; G.C. Ex. 11; A. 10, 118; G.C. Ex. 13; A. 11, 122). A card check obviously could provide Petitioner with no assurance that its employees had freely designated the Teamsters.[74]

In this regard, the Court below held:

> "Here the company made no attempt to discover what the actual card situation was when the union requested recognition for the wire workers unit . . ." (A. 212)

It is difficult to determine on what basis the Court placed such a burden upon Petitioner. The risk of violation of Section 8(a)(1) by an employer in making such investigation is substantial. As stated in *NLRB v. Dan River Mills*, 274 F.2d 381 (CA-5, 1960):

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[74] This was all the more apparent when in August, the Teamsters claimed that they represented a majority of 87 production and maintenance employees at the Appleton plant, an obviously false claim, which was then followed by the demand for recognition with respect to non-existent apprentices. Both the Board and the Court of Appeals failed to consider the effect of this evidence. The Court stated: "Instead of recognizing the union on the basis of its *admitted* card majority, the company insisted on an election . . ." (A. 212). Of course, this analysis completely fails to consider the facts as of the date of the demand for the card check.

> "But like Odysseus, he (the employer) stands almost helpless as he makes the perilous passage between Scylla and Charybdis. If he makes a simple inquiry of each employee and accepts the simple answer, the very pressure apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation . . . At that point, undefined and undefinable, the inquisitor trespasses either on forbidden ground or flounders in the Serbonian bog surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice." (274 F.2d at 388)

In view of the election procedures established by the Act for determining "questions of representation", there is no warrant in law for even attempting to impose such a burden upon an employer.

The second alternative which was offered by the Court below was that Petitioner should have accepted a mere check of cards against its current payroll. While the instant proceeding provided testimonial evidence by the card signers themselves regarding the authenticity of the cards offered in evidence, a mere card check, as shown above, would have provided no assurance regarding any matter of substantive importance. As explained in detail by the Court in *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562 (CA-4, 1967)):

> "In stark contrast is a decisional rule that bypasses the election processes and places signed authorization cards on a parity with an affirmative vote in a secret election." (386 F.2d at 565)[75]

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[75] In *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), the Board went to great lengths to assure that employees would learn *all* the arguments for and against unionization in an organizing campaign. The Board required that a list of names and addresses of voters be furnished to the union, so they would be exposed to arguments from *both* sides. See *NLRB v. Wyman Gordon Co.*, 397 F.2d 394 (CA-1, 1968), cert. granted Nov. 12 1968, 21 L. Ed.2d 268.

We now discuss the question of "good faith doubt" as applied herein by the Board and by the Court below.

D. The Board Errs When It Attempts To Make The Right To An Election Turn Upon The Question Of Good Faith Doubt. In Any Event The Evidence Of A Lack Of Such Doubt Relied Upon By The Board Does Not Support Its Order.

The question of "good faith doubt" involved two (2) issues. The first, the question of Petitioner's doubt with respect to the appropriateness of the bargaining unit. With respect to both issues, the Board found that Petitioner did not have a good faith doubt on September 20. It held that Petitioner:

> "was not motivated by any good-faith doubt as to the Union's *majority* status in an *appropriate bargaining unit* . . ." (A. 195)

The Board attempts to justify its bargaining orders by focusing on a *past* state of mind which has no relevance to the true issue. Here, the Union made claims of majority representation and demands for recognition in August, in September and in October. Each claim and demand was for a different bargaining unit. In October, it filed a representation petition under Section 9(c) of the Act alleging that it desired to be certified "pursuant to Sections 9(a) and (c) of the Act" (Resp. Ex. 1; A. 86). Early in November, it signed a Stipulation for the conduct of a Consent Election (Resp. Ex. 2; A. 86, 147). Item 8 of that Stipulation provided in part:

> ". . . a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c)." (A. 148)

Over Petitioner's objections, the Union was permitted to withdraw from that Stipulation on November 8 (Resp. Ex. 5; A. 87, 152; Resp. Ex. 7; A. 87, 154). On November 8, it was permitted to file a *second* representation petition requesting that it be certified "pursuant to Sections 9(a) and (c) of the Act (G.C. Ex. 1(a); A. 4). On November 23,

it signed a *second* Stipulation for a Consent Election, which was approved on November 26 by the Board's Regional Director (G.C. Ex. 1(b); A. 4), which also stated that a question of representation existed.

The proper inquiry by the Board should have been, under the foregoing facts and circumstances, did Petitioner engage in conduct on and after November 23, which made it just and proper (1) to permit the Teamsters to also withdraw from its *second* Stipulation even though a question of representation existed at the time it was executed, and (2) to now hold that such question of representation had not been resolved by the secret ballot election which the Union lost?

In this case, the Board attempts to establish, retroactively, that notwithstanding the *two* Stipulations signed by the Teamsters in November, and notwithstanding the October claim of majority and representation petition, that a question of representation did *not* exist in September or at any time thereafter. In effect, the Board has attempted to expunge the October claim and demand, the October and November petitions and both Stipulations from the record.

The Board has done so by directing the issue to alleged "good faith doubt". Still, the Board ruled here that the *same bargaining order* would have issued:

> "*even if the record had warranted the conclusion,* contended for by . . . (Petitioner), *that it relied upon a bona fide doubt* of the Union's majority in refusing to bargain with the Union . . . Effectuation of the policies of the Act would *still require such a bargaining order* in order properly to remedy . . . (Petitioner's) other unfair labor practices herein found". (A. 198)

Therefore, the Board itself, in its Decision here, held that the question of good faith doubt *was irrelevant* to its decision, inasmuch as it would have issued a bargaining order in any event.

Despite the above ruling by the Board regarding the irrelevancy of "good faith doubt", the Court of Appeals not

only relied upon that issue in enforcing the Board's order, but also *placed the burden of proof upon* Petitioner:

> "We therefore conclude that *the Company* made no real showing of good faith doubt either as to the union's majority status or as to the appropriateness of the bargaining unit". (A. 212)

Even the Board did not attempt to impose this burden upon Petitioner! The Board held:

> ". . . The burden is on the General Counsel to establish affirmatively that a good-faith doubt of majority was not the reason for . . . (Petitioner's) refusal to bargain . . ." (A. 195, 196)[76]

It is clear, in this respect, that the Court below did not enforce the Board's order "on the same basis articulated in the order by the agency itself". *Burlington Truck Lines v. United States Lines*, 371 U.S. 156, 169 (1962).

We now discuss the evidence relied upon by the Board with respect to its "good faith doubt" finding, assuming, *arguendo*, that it remains relevant to the bargaining order issue in this case.

E. The Only Evidence Relied Upon By The Board To Support Its Conclusion That Petitioner Lacked A Good Faith Doubt Regarding The Union's Majority Status Was Its "Totality" Findings With Respect To Petitioner's Communications

Numerous Courts have held that there is no rational connection between another unfair labor practice and the state of mind of "good faith doubt". This is particularly so here when the "totality" is related back to September 20 and the subsequent inconsistent conduct by the Teamsters is ignored.

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[76] See also *NLRB v. River Togs, Inc.*, 382 F.2d 198, 206 (CA-2, 1967) and *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764, 768 (CA-6, 1968), where it was held that the General Counsel carried this burden.

The Court of Appeals held in *Lane Drug Co. v. NLRB*, 391 F.2d 812 (CA-6, 1968), that violations of Sections 8(a)(1) and 8(a)(3) were not in themselves sufficient reason to negative a good faith doubt:

> "An 8(a)(1) violation without more is just as consistent with a disbelief in the majority status of the union as it is with the belief in the majority status." (391 F.2d at 820)

The same ruling has been made in *NLRB v. River Togs, Inc.*, 382 F.2d 198, 201 (CA-2, 1967) where it was held that good faith doubt was not negated by a desire to thwart unionization by proper or even by improper means; and in *NLRB v. S. S. Logan Packing Co.*, 386 F.2d 562, 564 (CA-4, 1967), "minimally coercive questioning . . . has no relevancy to" refusal to bargain issues; and in *NLRB v. Fashion Fair, Inc.*, 399 F.2d 764 (CA-6, 1968) the Court held that violations of Section 8(a)(3) and (1) did not demonstrate that the employer lacked a good faith doubt of majority status; and finally in *NLRB v. Texas Electric Cooperatives, Inc.*, 398 F.2d 722 (CA-5, 1968), it was held that extensive violations of Section 8(a)(1) did not show an employer's bad faith.

The Board made no findings or analysis to show that there was a rational connection between Petitioner's communications and the presence or absence of good faith doubt on September 20. The record shows that there were no communications with employees after the July speech until November 2, a period of nearly four (4) months![77] During that period the Teamsters made three recognition demands, took four different positions with respect to the appropriate unit, filed a representation petition and executed an election Stipulation.

How the July talk and the communications which commenced on November 2 proved or even tended to prove

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[77]We exclude from consideration here the discussion with Bougie (A. 182) and the notice of October 21 (Resp. Ex. 15; A. 97, 158).

Petitioner's state of mind on September 20 is wholly unexplained on this record. Rather than showing a lack of good faith doubt, Petitioner's communications on and after November 2 show a justified irritation with the conflicting and inconsistent positions taken by the Teamsters with respect to Petitioner's employees.

With respect to the bargaining unit, the Board found it necessary to explain away the non-existent apprentices. The record is clear that Petitioner had insisted that a two (2) plant production and maintenance unit was the appropriate unit. The Union *agreed* with this position in its *first* Stipulation. The *second* Stipulation was for a unit with respect to which the Union had never made a demand for recognition. By reason of automation Petitioner believed that Journeymen weavers were not entitled to separate representation. However, when Board representatives indicated that the contrary might be true Petitioner did not insist upon a hearing to litigate the question. It is difficult to characterize such conduct as being in bad faith.[78]

In this regard we cite only *Lane Drug Co. v. NLRB*, 391 F.2d 812 (CA-6, 1968) where the Court pointed out that the Union's unit request was not clear and that: "The employer was supposed, apparently, to divine" who the Union intended to include in the unit. The Court stated:

> ". . . All of these questions suggest that *the best procedure to be followed* in a case of this kind *is a Board-conducted election*, where the bargaining unit would be determined by the Board . . ." (391 F.2d at 820)

We point out that it is the Board's duty under Section 9(c) to also determine the appropriate bargaining unit, in

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[78]The Court will note the Board's efforts to distort the evidence with respect to the non-existent apprentices. The Board found President Sinclair's "argument" concerning apprentices to be "specious. Sinclair very well knew what an apprentice wire weaver was" (A. 193). The record shows that President Sinclair testified that he "did not know who the . . . *Union* might be referring to when they specified wireweavers and apprentices" (A. 33).

accordance with Section 9(b) of the Act. Through the bargaining order procedure the Board avoids performance of that duty, requires employers to negotiate such questions and unduly emphasizes extent of organization as a factor.

Our attention will now be directed to the Board's conclusions regarding loss of employee support, dissipation of the Union's majority and the alleged "impossibility" of conducting another election.

F. The Board's Conclusions with Respect to Loss of Union Support, that Petitioner Sought Time in Which To Dissipate the Union's Majority and that It Was Impossible To Conduct Another Election Lack the Support of Reasoned Findings and Ignore Large Parts of the Record

The Board has not explained by analysis or by reasoned findings *how* Petitioner's "total" communications with its employees support its conclusions. Having found a violation of Section 8(a)(1), the Board reasoned that such violation *ipso facto* proved all other elements in the case and disregarded substantial countervailing evidence as we will show.

(1) *The Board's Conclusion That Petitioner's Communications Caused The Union To Lose Support Is Not Warranted By The Record Considered As A Whole*

The Board made two findings in this regard, as follows:

> "To the extent that the election revealed a loss of union support, such loss *must be found* attributable to the . . . (Petitioner's) unfair labor practices" (A. 191 and 198).

and

> ". . . (Petitioner) engaged in a coercive course of conduct designed to induce the employees to abandon their support for the Union and which dissipated the Union's majority status" (A. 195).

There are no findings and there is no analysis of the particular evidence which was included in the "totality" which supports this conclusion. The record shows that all eleven (11) of the Union's authorization cards were signed by the weavers *after* the July talk.[79] It, therefore, affirmatively appears that the July talk coerced no one and had no effect upon the Teamsters ability to obtain signed authorization cards.[80] Subsequently the Teamsters believed that it was so successful in its organizing efforts that in August and in October it sought to represent all production and maintenance employees.

With respect to the wire weavers, although the Teamsters had received authorizations from a majority as early as *July 9* it made no attempt to represent them in a separate unit until nearly two and one-half (2-1/2) months later. The Teamsters then promptly abandoned that attempt only twenty (20) days later. It was not until November 8, *four (4) months* after it had received a majority of cards from the weavers, that the Teamsters again instituted its attempt to represent them in a separate unit.

The Board and the Court below gave no consideration to the question whether the Teamster delay, dilatory tactics and frequent change of position had any effect upon the results of the election. Nor is there any evidence in the record to show that a majority of the weavers in fact fav-

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[79]Niesner on July 6 (G.C. Ex. 2; A. 5); Cleland, Goulet and Bougie on July 7 (G.C. Ex. 28; A. 23; G.C. Ex. 31; A. 29; G.C. Ex. 32; A. 85); Hass, St. Germain, Geissler, Sikorski and Dean on July 8 (G.C. Ex. 23, A. 15; G.C. Ex. 24; A. 17; G.C. Ex. 26; A. 20; G.C. Ex. 27; A. 22; G.C. Ex. 29; A. 26); Neil and Brunault on July 9 (G.C. Ex. 25; A. 17, 18; G.C. Ex. 30, A. 28).

[80]Petitioner's subsequent communications were largely a repetition and further elaboration of the July talk. There is no evidence that they had any greater effect than the July talk.

ored separate representation rather than being included in an overall-production and maintenance unit.[81]

Despite the pertinency of these facts to the question as to *why* the Teamsters lost support, the Board completely ignored them, apparently believing that its *ipso facto* conclusion made it unnecessary to do so. In the face of this evidence the Board found that the Union "has been, and still is" (A. 192) the weavers representative.

(2) The Conclusion That Petitioner Sought Time In Which To Dissipate The Union's Support Is Likewise Unsupported By Analysis Or Findings

The Board found that Petitioner's refusal to bargain was not motivated by a good faith doubt either as to the Teamsters' majority status or as to the appropriateness of the unit:

> ". . . but was instead motivated by a desire to gain time within which to dissipate that majority status" (A. 195).

Again this conclusion by the Board was based entirely upon its "totality" bindings. During the period from July to November 2, the date of Petitioner's first letter to employees, Petitioner engaged in no communications with its employee concerning the Teamsters organizing campaign. During this period the Teamsters made the August, September and October demands for recognition, filed its *first* election petition and took at least four (4) different positions with respect to the appropriate unit. *There is no evidence that Petitioner sought to delay at any time.* On November 2 it signed a Stipulation for an election. After being advised by the Board that a wire weaver unit would be considered appropriate, it did not demand a hearing, but

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[81] The Teamsters initial letter (G.C. Ex. 3; A. 6, 108) was sent to all Appleton plant employees and in July the organizing effort was for an overall production and maintenance unit.

instead signed a *second* Stipulation so that an election could be held.[82]

The foregoing evidence was not considered by the Board either with respect to its conclusion that Petitioner sought to dissipate the Teamsters majority or with respect to the issue of "good faith doubt."

(3) *The Board's Conclusion With Respect To the Required Remedy Constitutes An abuse Of Discretion And Is Not Supported By Analysis, Evidence Or Reasoned Findings*

The Board, in the final step of its bootstrapping technique, also used its findings regarding the "totality" of Petitioner's communications to justify its choice of remedy. In that regard the Board stated:

> "While a Board election is normally the best method of determining whether or not employees desire to be represented by a bargaining agent, where, as here, an employer engages in unfair labor practices which make *impossible* the holding of a free election, there is no alternative but to look to the signed authorization cards . . ." (A. 191)

Based upon the above finding of "impossibility" of holding a free election, and upon its further finding that the Union "still is" the representative of Petitioner's employees, the Board issued a bargaining order (A. 198).

As shown above, although the Board relied upon Petitioner's lack of "good faith doubt" it then held that its good faith doubt or lack thereof was irrelevant because:

> "To the extent that the election revealed a loss of union support *thereafter* (i.s., after the September 20

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[82]The *second* Stipulation was arranged by telephone without a meeting. President Sinclair authorized its execution by the Production Manager so there would be no delay.

> demand), such loss must be found attributable to the . . . (Petitioner's) unfair labor practices. Therefore, effectuation of the policies of the Act would *still require* such a bargaining order in order properly to remedy . . . (Petitioner's) *other* unfair labor practices herein found" (A. 198).[83]

The Board made no analysis or reasoned findings to support its *ipse dixit* conclusion that it was *impossible* to conduct a second fair election. In *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962) this Court pointed out that the Interstate Commerce Commission had made "no findings and no analysis . . . to justify the choice made." This Court further stated (371 U.S. 167) that "'Congress did not purport to transfer its legislative power to the *unbounded discretion* of the regulatory body'" and that its discretion must be exercised within the bounds set forth by the applicable statute.

> "And for the court to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' The agency *must make findings that supports its decision, and those findings must be supported by substantial evidence* . . . Here the Commiddion made *no findings specifically* directed *to the choice* between two *vastly different remedies* with vastly different consequences . . ." (371 U.S. 167, 168)

Here, likewise, the Board made no findings specifically directed to the choice between vastly different remedies with vastly different consequences. Particularly, its *key* finding that the Teamsters "still is" the representative of Petitioner's employees is completely lacking in any evidentiary support whatever! While the Board may *contend* that

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[83]This conclusion should be compared with that of the Regional Director in his Report on Objections when he recommended that the results of the election be certified! As pointed out above he had the same evidence before him (G.C. Ex. 1(d) A. 4).

the cards signed in July constitute such evidence, such conclusion can only be reached by ignoring all other evidence shown by the record as a whole.[84] The further key finding of "impossibility" of conducting an election is also without objective support.

The Board's procedure here was (1) to make a finding of violation of Section 8(a)(1) of the Act and (2) to characterize the same facts as also constituting a violation of Section 8(a)(5). In the Board's view this "automatically" calls for a bargaining order instead of a determination by it regarding the proper choice of remedy for the Section 8(a)(1) violation. In this fashion, the employer and the employees are denied the right to an election. We submit that the Board's authority under the Act does not encompass that procedure here.

Other Courts of Appeal have rejected the Board's conclusions in this respect, especially in view of the Congressional policy of free employee choice and the danger of imposing upon employees a bargaining agent not of their choice. While the Courts of Appeal have given lip service to the good faith doubt theory, their decisions show that they have really addressed themselves to the problem of choice of remedy and the evidence supporting such a choice. The "notorious unreliability" of authorization cards is a factor to be considered.

In *NLRB v. Flomatic Corp.*, 347 F.2d 74 (CA-2, 1965), the Court held that a bargaining order was "strong medicine" to be applied only "with restraint" (347 F.2d at 78, 79). It emphasized the danger to the employee's freedom of choice if a bargaining agent was imposed upon them. It held:

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[84]The Court of Appeals held only that it was "reasonable" to conclude that the Union's majority status had been dissipated by Petitioner's "unlawful interference" and that the "Board was warranted in entering a bargaining order rather than ordering a new election" (A. 213).

> "No court, however, has held that a borderline, unaggravated § 8(a)(1) violation, standing alone, occurring prior to an election, warranted a bargaining order" (347 F.2d at 79).[85]

The Court held that a "more appropriate" remedy was a cease and desist order and a second election.

In *NLRB v. Ben Duthler*, 395 F.2d 28 (CA-6, 1968), the Court found that the unfair practices were not flagrant and that the Board's duty was "to protect the bargaining rights of employees, not the bargaining rights of (a) union". It further held:

> "We find that in this case a re-run election would more clearly express the employees' desires, and therefore deny enforcement of the Board's bargaining order." (395 F.2d at 34)

Three recent decisions by the Second and Sixth and District of Columbia Circuits demonstrate the proper principles to be applied. The first is *NLRB v. Priced-Less Discount Foods, Inc.*, ___ F.2d ___, 70 LRRM 2007 CA-6, 1968). There the Court enforced a Section 8(a)(1) order of the Board based upon the Employer's solicitation of withdrawals of authorization cards, which resulted in the Union *being unable to petition for an election.* There was no inquiry into good faith doubt or any other peripheral issue, but only as to the appropriate remedy. Inasmuch as the employer's conduct had gone to the heart of the representation question and had prevented an election from even being held, just as would discharge of all Union supporters, the Court enforced the finding that a fair election would have been impossible and enforced the bargaining order. However, there are no such facts here.

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[85]Here the § 8(a)(1) violation found by the Board was based solely on Petitioner's "words" which the Regional Director found inadequate to prevent certification of the results of the election.

The second decision is *Amalgamated Clothing Workers of America v. NLRB*, ___ F.2d ___, 70 LRRM 2207 (CA-D.C., 1969) where the Board issued a bargaining order based upon violations of Section 8(a)(1). The Court disagreed with the Board's conclusion that employee desires could be most closely approximated by authorization cards. The Court stated:

> "The Board also *says* that a 'fair election' cannot be held . . . But that averment is not impressive on the present record; we do not know upon what the conclusion is based, or what the Board means by 'fair', or to whom" (70 LRRM at 2210).

It held that the Board was required to give effect to the "real choice" of the employees and that it could not "avoid that responsibility upon such a paucity of evidence as this record contains". The Court set the Board's order aside.

The third decision is *NLRB v. Pembeck Oil Corporation*, ___ F.2d ___, 69 LRRM 2811 (CA-2, 1968). There the Court affirmed the Board's findings that the Employer had violated Sections 8(a)(1), 8(a)(3) *and* 8(a)(5) but it nevertheless *refused* to enforce the Board's bargaining order. The Court emphasized the risk of imposing a bargaining agent at a time when the employees "no longer wish it to represent them". The Court stated that a bargaining order should not be enforced by rote:

> ". . . The finding of an unlawful refusal to bargain does not *ipso facto* and in all cases lead to the conclusion that an order to bargain must always be the only remedy for the violation." (69 LRRM at 2817)

The Court held that a bargaining order in this case would be "excessively strong medicine" for the ailment and unfair to both the employer and its employees.

The foregoing shows that good faith doubt or the lack thereof is irrelevant to the issue of a bargaining order. The finding of violation of Section 8(a)(5) should be set aside. In the event it is considered that a violation of

Section 8(a)(1) occurred here, such violation was too minimal to justify the issuance of a bargaining order. In any event, the Board's order is not supported by appropriate findings which would justify such relief.

We have previously stated that it is axiomatic that there could not be a Section 8(a)(1) violation based upon statements, each of which was protected by Section 8(c) of the Act and by the First Amendment to the Constitution. It follows, and it is equally axiomatic, that an alleged Section 8(a)(5) violation, supported only by such a pseudo Section 8(a)(1) violation, must fall.

CONCLUSION

For all of the reasons set forth herein, the judgment of the Court of Appeals should be reversed, and an order should be entered setting aside the Order of the Board.

Respectfully submitted,

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